

The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State

by
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*Poetic Justice, with her lifted scale,
Where, in nice balance, truth with gold she weighs,
And solid pudding against empty praise.¹*

Introduction

The balance has been a popular metaphor of judgment for millennia. Ancient Egyptians, Israelites, Babylonians, Greeks, and Romans employed the balance as an image to assay rival versions of truth and to judge one's virtue.² Nevertheless, a tension in meaning pervades

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1. *Alexander Pope, The Dunciad*, bk. I, ll. 52-54, in *THE SELECTED POETRY OF POPE* 242 (Martin Price ed., 1980).

2. Perhaps the most famous judgment of all time is that of Belshazzar, written on the wall by the hand in a cloud: "You have been weighed in the balance and found wanting." *Daniel* 5:27, in *TANAKH: THE HOLY SCRIPTURES* 1480 (1988). The true and false balances, both as means of judgment and as means of assessing the honesty of the user, are popular metaphors in Jewish scripture. See, e.g., *Job* 31:6, in *TANAKH, supra*, at 1382 ("Let Him weigh me on the scale of righteousness; Let God ascertain my integrity."); *Proverbs* 11:1, in *TANAKH, supra*, at 1302 ("False scales are an abomination to the Lord; An honest weight pleases Him."); *Proverbs* 20:23, in *TANAKH, supra*, at 1318 ("False weights are an abomination to the Lord; Dishonest scales are not right."); *Hosea* 12:8 in *TANAKH, supra*, at 1000-01.

the metaphor's use. In the hands of an honest merchant, the balance is an implement for fine comparisons of honest value. Used by a corrupt merchant, however, the balance is a tool for deceit, a scale in which truth is weighed against gold or pudding against praise.³ With this tension in mind, we consider the rhetoric of balance, and other modes of interpretation, in comparing the arguments of governments against those of citizens in constitutional adjudication.⁴

I. Preliminaries

Our courts are frequently required to rule upon citizens' arguments opposing the burden of laws, choosing between arguments by

("A trader who uses false balances, who loves to overreach, Ephraim thinks, 'Ah, I have become rich; I have gotten power.'"). Homer records Zeus's placing the sentences of death of Hector and Achilles in the pans of a balance which, when lifted by the beam, tilted against Hector, sealing his fate. HOMER, *THE ILIAD* 402 (E.V. Rieu trans., 1950). Roman metaphors of justice as a balance are collected from Horace, Juvenal, and Plutarch in BURTON STEVENSON, *THE MACMILLAN BOOK OF PROVERBS, MAXIMS, AND FAMOUS PHRASES* 1286 (1948). Stevenson also describes the stele of an Egyptian Middle Kingdom priest Antef, housed in the British Museum, which proclaims "I am a man of justice, like the scales impartial." *Id.* Moreover, the Egyptian representation for the judgment of a life was a balance weighing a heart, representing the person's life, against a feather, representing the person's soul, truth, and honor. See, e.g., E.A. Wallis Budge, *THE EGYPTIAN HEAVEN AND HELL* 50-51 (1989) (describing the papyrus of Ani).

3. The metaphor of the balance deceived was surely borrowed by Pope. The poet George Herbert wrote, as a proverb, "The balance distinguisheth not between gold and lead." George Herbert, *Jacula Prudentum*, quoted in STEVENSON, *supra* note 2, at 116, from the 1640 edition, although it appeared under this title in 1651. In any event, Pope presents Justice defrauded by her balance as but one example of the destruction of the fine arts while the world moves from the soulful appreciation of reason in words and art toward the dunces' empty patter and sham spectacle.

4. I mean nothing by substituting "adjudication" for "interpretation." Although there is a rich debate over the distinctions between the central ideas reflected in these words, I employ them interchangeably in the limited context of constitutional adjudications that turn upon an interpretation of the constitution. See David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 Nw. U. L. REV. 641, 643 n.6 (1994) [hereinafter Faigman, *Madisonian Balancing*] (citing Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 739 (1982) ("Adjudication is interpretation: . . . the process by which a judge comes to understand and express the meaning of an authoritative legal text . . ."); Robin L. West, *Adjudication Is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 TENN. L. REV. 203, 207 (1987) ("[A]djudication . . . is an imperative act.")). In this broad sense I have, perhaps perilously, collapsed the distinction so carefully wrought by Professor Henkin in discriminating balancing as interpretation from balancing as doctrine. See Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1028-46 (1978). I, however, see little difference between balancing that is necessary to resolve conflict between constitutional values (interpretation) and balancing that becomes a substantive element of particular doctrines that require resolution of conflict between constitutional values (doctrine). *Id.* at 1046-47. The essential difference seems to me to be the higher profile of doctrinal usage.

the citizen that a law is somehow improper and by the government that the law is proper. Recently much attention has been focused on one method of choosing between such arguments: the balancing opinion.⁵ In this century, the Supreme Court has employed this device as a basis for upholding, modifying, and rejecting the constitutional validity of both state and federal laws.⁶

Balancing is, of course, only one of several modes of constitutional analysis.⁷ The balancing approach is often said to oppose a for-

5. Professor Aleinikoff has succinctly defined the "balancing opinion" as "a judicial opinion that analyzes a constitutional question by identifying interests implicated by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests." T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987).

6. The classic example of the Court's modification of a law because the state and personal interests involved were very nearly balanced is *Roe v. Wade*, 410 U.S. 113 (1973). Examples of laws that have been upheld because the state interest "outweighs" the individual rights asserted are common, while examples of laws that have been overturned because the individual interest "outweighs" the state interest are rare. Of course, this statistical feature of court dockets, whether of the Supreme Court or the district courts, has as much to do with who brings suits into the courts, and the issues they bring, as it does with the courts themselves.

Professor Aleinikoff differently divides the forms of the metaphor of balance into two, rather than three, forms of opinion: (1) when one interest outweighs another, and (2) when the interests are roughly equal in weight. Aleinikoff, *supra* note 5, at 946. While the difference between considering the metaphor to encompass a duet or a trio might appear slight, it is not. Aleinikoff's duet approach suggests that one "outweighing" is like another, that there is no difference between a triumph in the balance for the state or for the citizens. A sense of equal chance to "outweigh" the opponent is incorporated into the duet, because the duet reflects the Court's prose. But there remains a critical distinction between imbalance favoring the citizen and imbalance favoring the state. The Court's doctrines have long indicated that a declaration of the unconstitutionality of a state or federal law is to be made only as a last resort. To assume the Court is as willing to strike down a law as to uphold it runs afoul of too many judicial pronouncements to the contrary. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988) ("[T]he traditional presumption [is] in favor of the constitutionality of statutes enacted by Congress . . ."); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 627 (1969) (general presumption of state statute constitutionality does not extend to decisions regarding equal protection, which must be carefully scrutinized by the Court). That even so shrewd an observer of the Court as Professor Aleinikoff is willing to allow a classification to include the unmodified support of a law with its outright rejection in the single term "outweighing" may prove the seductive but false appearance of symmetry in the metaphor.

7. Of the various modes, though, balancing is thought of as the growth industry. Many commentators rightly consider balancing to be a phenomenon that will be employed with increasing frequency for some time to come. Writers have greeted this belief with varying degrees of dread. Compare Aleinikoff, *supra* note 5, at 1005 ("Constitutional law is suffering in the age of balancing. It is time to begin the search for new liberating metaphors.") with Frank M. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 42 (1988) ("I see the preferred decision process not as a cataclysmic metamorphosis but as a more modest process of sedimentary accretion—in other words, not broad,

malist, or categorical, approach,⁸ which "is the taxonomist's style—a job of classification and labelling" such that "[o]nce the relevant right and mode of infringement have been described, the outcome follows."⁹ Many commentators have disputed the merits of both approaches to constitutional analysis.¹⁰

Early advocates for balancing, such as Dean Roscoe Pound, saw balancing social interests against absolutist legal principles as a means of allowing courts to more easily respond to social conditions.¹¹ The problem with categorization was (and remains) that it locked into precedent conceptions of law that, within a few decades, had become sufficiently divergent from the norms of society to be popularly seen as unjust.¹²

bright-line pronouncements but cautious, incremental decisions reached by detailed, careful, open balancing.").

8. See Frank M. Coffin, *supra* note 7, at 25 (Judge Coffin observes that balancing does not "eliminate all subjective forces from decision"; once a judge identifies an issue and considers the rule and opposing interests, the judge's subjective values come to bear and affect "the moment of choice"—the balance); see also Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992); Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. 319 (1992).

This dichotomy between balancing and categorical or formal analysis is essentially the same dichotomy referred to in the distinction between standards and rules in constitutional adjudication. See David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*, 44 HASTINGS L.J. 829 (1993) (collecting recent scholarship focusing on this debate).

9. Sullivan, *supra* note 8, at 293.

10. For a view opposing balancing in favor of categorical analysis, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); for a view in support of balancing, see Frank M. Coffin, *supra* note 7, at 16. Rather than repeat bibliographic work performed elsewhere, I suggest that a curious reader consult the notes of Professor Aleinikoff's work, *supra* note 5. For more recent scholarship, the works of Professors Faigman and Gottlieb are relatively exhaustive. Professor Faigman offers an excellent comparison between balancing and historically-based modes of analysis. See David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521 (1992); Faigman, *Madisonian Balancing*, *supra* note 4. For the context of interests weighed in the balance, Professor Gottlieb's articles and editorial efforts are unparalleled. See PUBLIC VALUES IN CONSTITUTIONAL LAW (Stephen E. Gottlieb ed., 1993) [hereinafter GOTTIEB, PUBLIC VALUES]; Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825 (1994) [hereinafter Gottlieb, *Paradox of Balancing*]; Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988) [hereinafter Gottlieb, *Compelling Governmental Interests*].

11. Roscoe Pound, *A Theory of Social Interests*, PAPERS AND PROCEEDINGS OF THE AMERICAN SOCIOLOGICAL SOCIETY, May 1921, at 16, reprinted in Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 39 (1943).

12. No more notorious banner for this phenomenon flies in constitutional education than does *Lochner v. New York*, 198 U.S. 45 (1905). *Lochner* famously stands as the centerpiece of condemned formalism, and its place in the sun as an impetus for balancing is discussed in Aleinikoff, *supra* note 5, at 951-52.

Commentators opposed to balancing have raised a number of essential concerns: It gives an immoderate measure of discretion to judges to second-guess legislative decisions; it requires an impossible comparison of incommensurable values as if they are commensurate; and, thus, balancing seems to be more precise than it can truly be.¹³ A fourth concern, derived in part from the problem of comparing essentially incommensurate values, is that the process of reaching the decision in such cases is a bit mysterious, and thus the bases for the decision are not communicable.¹⁴

Despite these concerns,¹⁵ the discussion about whether the balancing or the categorical approach is better to adjudicate disputes between citizens and their governments reflects a false dichotomy.¹⁶

13. Professor Faigman has nicely corralled these criticisms into a succinct discussion in Faigman, *Madisonian Balancing*, *supra* note 4, at 648-55.

14. Professor Aleinikoff has described the balance as taking place in a black box, as a "hidden process [that] raises the specter of the kind of judicial decisionmaking that the Realists warned us about and that balancing promised to overcome." Aleinikoff, *supra* note 5, at 976 (footnote omitted).

In a rare moment of judicial candor, Judge Aldisert's opinion in *Loughney & Osborne v. Hickey*, 635 F.2d 1063, 1068 (3d Cir. 1980) (Aldisert, J., concurring), expresses grave dissatisfaction with the failure of balancing to satisfy a judicial obligation for a reasoned basis for decision. This argument is particularly developed in Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987).

15. Although scholars now commonly reject the notion that balancing per se invites liberal judicial results while categorization invites conservative results, some hint lingers of both the progressive taint to balancing and, perhaps thanks to Justice Scalia's promotion of categorical analysis, the conservative taint to categorical reasoning. See, e.g., *Bendix Auto-lite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (rejecting the "balancing" approach in commerce clause cases and leaving legislative judgments to Congress) (In balancing, "the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy."). To some extent, balancing may provide tools to more easily thwart the ideals of stare decisis, at least without acknowledging a refusal to apply older doctrine. This is not to say that a categorical analyst cannot make at least enough exceptions and redefinitions to be as intellectually dishonest as a balancer.

As to the ideological relationship of balancing to a liberal agenda, it is understood that one result of the famous arguments between Justices Black and Frankfurter is that categorical or absolutist views of free speech may better protect speech in times of crisis. See John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1500 (1975). Indeed, balancing as a doctrine for the resolution of free speech disputes is both less common and less ideologically polarized than might be supposed. See Henkin, *supra* note 4, at 1043.

Professor Aleinikoff has shown rather convincingly that balancing, as promoted by Holmes, Pound, and Cardozo, gained popularity not as an expression of an ideological polarity, but as a compromise between conservative formalism and nihilistic realism. Aleinikoff, *supra* note 5, at 963.

16. Moreover, while we have come to consider categorization and balancing as the archetypes of judicial modes of analysis, there are certainly others. Professor Ducat offers

First, the two methods are not mutually exclusive. In many cases the balancing analysis can only be undertaken if the court categorizes the governmental interest, and does so according to the nature of the citizen's interest allegedly infringed. As a result, many disputes are seemingly resolved not by the rhetorical comparison of the interests involved, but by the categorical choice of the scheme by which the comparison will be made. The categorical choice preceding the balance is the locus of such famous disputes as whether a legal classification based on gender is balanced by the "strict scrutiny" test or a test more readily met by the government,¹⁷ or whether a limitation on the free exercise of religion must be balanced by a "compelling governmental interest" or by something lesser.¹⁸ Thus the balance, while sig-

a fine discussion of balancing as one mode of analysis comparable to absolutism and the approach of preferred freedoms. See CRAIG R. DUCAT, *MODES OF CONSTITUTIONAL INTERPRETATION* (1978). While one might say that these other two modes of analysis are included in the more generic conception of categorical analysis, other distinct modes remain. One mode that compromises between the two is proposed in Part IV *infra*. Other modes of interpretative selection include balancing weighted by historicism and just plain picking. One form of historically biased balancing, a method of balancing through the lens of the Framers, is developed in Faigman, *Madisonian Balancing*, *supra* note 4. As for "plain picking," a disturbing look at the mantle sufficiently beneath the judicial crust to make the balancing/categorical dichotomy meaningless is provided in JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993). Even so, the view of both commentators and justices that the balancing and categorical approaches are fundamentally opposed methods of resolving a vote on a given opinion is not to be easily discarded. See Professor Sullivan's discussion of the categorical approach of Justices Scalia and Kennedy, as opposed to balancing by Chief Justice Rehnquist and Justices O'Connor and Souter, in *Employment Division v. Smith*, *Cohen v. Cowles Media Co.*, *Barnes v. Glen Theatre, Inc.*, and *Simon & Schuster v. Members of the New York State Crime Victims Board*. Sullivan, *supra* note 8, at 301-06.

17. Based largely on the Court's refusal to consider the female gender a suspect class, a statute discriminating against one gender or the other is to be upheld if the government can demonstrate an "exceedingly persuasive justification." See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (citations omitted). Even so, at least one member of the Court now believes "it remains an open question whether 'classifications based upon gender are inherently suspect.'" *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 373 n.* (1993) (Ginsburg, J., concurring) (citation omitted).

18. Justice Harlan's dissenting opinion in *Shapiro v. Thompson*, 394 U.S. 618, 658-63 (1969), still provides one of the finest discussions of the compelling state interest model. His complaint that such a test places the Court in the role of a superlegislature has found many echoes. *Id.* at 661. Undoubtedly, the setting of various standards in the balance is as important to the constitutional policy of the executive and legislature as to the courts. Note the recent assertion by Congress of increased protection of religion over that which it believes would be given by the Court. The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993). The Act purports to change the test justifying a governmental act that incidentally burdens free exercise in order "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened." Religious Freedom Restoration Act § 2(b)(1), 107

nificant in the decision of the case, is usually framed within categorically established presumptions.

Moreover, the choice of one exclusive mode of adjudication or interpretation over the other is a moot debate. The Court balances, and the Court categorizes. Not only are both methods compatible, but both are now sufficiently entrenched as judicial tools of adjudication that the Court is unlikely to rewrite so much precedent merely because of a mode of interpretation.¹⁹

A more illuminating task must be to consider the joint implications of the criticisms of formalist and balancing modes of adjudication.²⁰ These criticisms together reveal a dissatisfaction with certain attributes of both forms of rationale employed in the Court's opinions, especially in opinions adjudicating arguments between the citizen and the state. The salient features of these criticisms are that the rationales of the Court's opinions must not only be sufficiently rigid to serve the needs of legal institutions, but also be sufficiently flexible to encompass changing conceptions of justice.

The needs of the legal institutions are reasonably well understood. The concern for predictability demands that a rationale for each decision be communicated by the authors of opinions, and so be replicable by other courts. The future effects upon related issues of any opinion should be discernable. These attributes of predictability also enhance the cultural acceptance of the Court's authority. When a judge's decision is preordained by the reasoning and judgments of ear-

Stat. at 1488. Even so, the nonjudicial branches attempt to raise or lower the standards at the peril of unconstitutionality.

19. Other arguments for rejecting the formalism/balancing dichotomy that are less *ipse dixit* in nature may be found in Gottlieb, *Paradox of Balancing*, *supra* note 10.

20. One common link between the critics of formalism and of balancing may be dissatisfaction with the results sought by authors using these tools. The essence of the complaint against the result of a balance is disagreement with the judgment of the author who drafted the balance. Likewise our concern for the categorical approach—once we account for tricks of definition and willingness to create new exceptions to older categories—is essentially the same concern for the author. Balances can be the basis of precedent, even if a balance when initially made is unpredictable, so long as the balanced result is then applied *per stare decisis*.

lier cases, the judge apparently exercises less personal discretion.²¹ Predictability thus enhances the authority of law in society.²²

The need for flexibility, particularly for responsiveness to the changing norms of justice in society, is also well understood. Although the concerns raised by Dean Pound and Justice Holmes arose in response to outdated conceptions of constitutional limits on labor law, similar arguments fueled the cases that ultimately overruled *Plessy v. Ferguson*.²³ Continued enforcement of rules of law that are seen throughout society as unjust quickly weakens the law's authority.²⁴ There must be a continuing evolution of fit between the laws applied in constitutional adjudication and the conceptions of justice in society.

Predictability and just results in the adjudication of arguments between the state and the citizen are both necessary to the authority of constitutional adjudication as an institution of the legal system.²⁵ Re-

21. The literature generally supporting these observations is vast, and familiar to most. I particularly mean to summon the images of Professors Wechsler and Black to support the goal of limited judicial discretion. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV L. REV. 1, 1-2, 10-20 (1959), reprinted in HERBERT WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 1, 3-4, 15-28 (1961); CHARLES L. BLACK, JR., *DECISION ACCORDING TO LAW* (1981).

22. A similar point underlies Professor Raz's elaboration of the sources thesis, a condition in which the existence and content of legal reasons can be established on the basis of social facts alone, without consideration of moral argument. Professor Raz argues that in the framing of authoritative rules, it is possible to distinguish between a deliberative stage ("the relative merit of alternative courses of action is discussed") and an executive stage ("such assessment is excluded"). Under the model of adjudication that stresses predictability, the courts act executively. JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 213-14 (2d ed. 1980).

23. 163 U.S. 537 (1896). *Plessy* is more than a casual example. *Plessy* was long invoked to support a variety of segregation laws in precisely the form of broad moral claim derived from police powers that this Article will criticize through an analytical lens. The danger of overreliance on such a lens, however, may be seen in the analytical argument presented to support segregationist city laws under the police powers in S.S. Field, *The Constitutionality of Segregation Ordinances*, 5 VA. L. REV. 81 (1917).

24. Commentators have spent considerable effort in this century examining the relationship between norm and law. Fundamentally, the idea is that an insufficient degree of obedience to law as a habit by the citizens of a legal system means that there is no legal system at all. See H.L.A. HART, *THE CONCEPT OF LAW* 107-20 (1961). Professor Greenawalt has lately reconsidered contexts in which injustice may serve as the basis of a moral argument to disobey the law. See R. KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 226-68 (1987).

25. Certainly, the observation that the Court's opinions must enshrine the excesses of neither overrigidity nor overflexibility seems commonplace. It is resonant with Professor Hart's statement concerning the open texture of law in general, that law is an institution insufficiently complete to be described by formalism or mechanical jurisprudence, but sufficiently bounded by rules governing both the conduct of citizens and the work of officials not to be described by rule skepticism. HART, *supra* note 24, at 121-50.

ardless of the mode of adjudication, these essentials must be largely satisfied if the Court is to perform its functions in a successfully authoritative manner.

The method used in common by opinions employing a balancing mode of adjudication and those employing a categorical mode is to place the arguments brought by the citizen and by the state into a framework for decision. This process, whether in a categorical or balancing opinion, involves the reduction of the arguments of each party into a description of an interest. Thus, the critical enquiry in constitutional investigation is not the device for comparison of the arguments before the court, but the methods by which those arguments are translated into interests. In other words, our real curiosity is not about the height of the balance or the construction of its arms, but about the weights in its pans.

Toward that end, Part II of this Article examines some of the methods by which the interests are defined, determining that, although some techniques are dictated by precedent, numerous methodological steps in the definition of interests are not controlled by prior decisions. A judicially constructed metaphysics of interests is needed. This need is most critical in delineating an interest derived from vast, "unfocused" governmental interests, such as police powers.

Part III examines some of the current difficulties of defining interests without rules of interest definition, as illustrated in two recent opinions reviewing state police power laws, *Bowers v. Hardwick*²⁶ and *Barnes v. Glen Theatre, Inc.*²⁷ The constitutional doctrine of police powers provides the states a federally recognized prerogative to enshrine as law any moral edict, unless that edict is confounded by federalism or a federally protected individual right. The correspondingly broad and "unfocused" citizen's right that might balance police powers, the right to substantive due process of law, is generally limited only to review of a state law for rationality. Even so, analysis of *Bowers* and *Barnes* strongly suggests that this review is erratic and—in the absence of underlying rules for the analysis of interests—remains inconsistent.

Part IV presents one method of analysis of "unfocused" interests as a function of the scrutiny that laws reflecting such interests must withstand to satisfy the requirements of due process of law. This method is drawn from recent scholarship concerning legal perfection-

26. 478 U.S. 186 (1986).

27. 111 S. Ct. 2456 (1991).

ism, the idea that the state has a legitimate but limited interest in a moral citizenry. According to this model of one attribute of a state, any law enshrining one conception of morality must meet a minimum standard of coherency. This coherency is not unlike the forms of the review of interests that the Court currently applies, but it includes an obligation by lawmakers of a communicable rational basis to justify the law.

II. Toward a Primer of Interest Examination

In recent years, the lack of an authoritative model for choosing the appropriate label for interests—which attributes of conduct form the basis of the constitutional interest, at what level of generality they should be described, and how many interests are cognizable—has left the Court without unequivocal guidance in framing such criteria.²⁸ After all, the process of defining a litigant's constitutional interest in a claim before the Court is the process of redefinition of the fundamental argument of that litigant. This process of redefinition of one interest may have the effect (or the intent) of unfairly emphasizing an attribute of the argument that the judge supposes will be especially attractive or repugnant to a reader. Once an interest is defined, the role that interest may play in the Court's deliberations—whether by balance, formal categorization, or any other mode of interpretation—may be cast. Despite this possible skew in the process of interest definition, there are certain methods the Court has routinely relied upon in defining and limiting the scope of an interest reflected in an argument before it. Although the Court may focus on one characteristic of an interest to the exclusion of another, each of these methods is implicitly incorporated in any definition of an interest.

Much of the meaning given to the various methods the Court has employed in evaluating state interests certainly results from the level of scrutiny the Court applied while employing these methods. Some

28. There are some tangential limitations on the characterization of the interest by both the parties and the lower courts, but these are hardly binding on the Court when it examines the interest. The issue is further confounded by operation of specific parties' claims in order to demonstrate standing on various issues. For example, in *Bowers*, Justice White noted that the district court's dismissal of a married couple's complaint for lack of standing left before the Court only Hardwick's claim to commit homosexual sodomy, 478 U.S. at 188 n.2. Even so, Hardwick had pleaded his more general argument of privacy since filing his complaint, and the dismissal of the John and Mary Doe did not necessarily characterize his interest as either a specific interest in homosexual sodomy or a general interest in privacy. See *Hardwick v. Bowers*, 760 F.2d 1202, 1211-12 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986).

methods, such as evaluating laws to determine that the laws' means are the least burdensome to other constitutional interests, are usually not considered unless arguments other than due process alone have led the Court to apply a heightened scrutiny to the statute.²⁹ The following brief survey of methods of evaluating a state interest does not account for this often critical attribute of the Court's views of these techniques of interest evaluation. This is so both because, as with methods of evaluation per se, the method in question may be sufficiently understood regardless of the limits on its use that are independent of its modes of analysis, and because the contexts in which the tests have historically been applied (and thus the limitations on the Court's usage of each test) are generally well known.

A. Describing the Interest

Perhaps the most critical task of balancing an interest is to name it. Even though it seems only to be the token of an argument, the label applied to the interest may very well determine whether that argument can prevail. Although judicial disagreement is not uncommon in the labelling of the state interest, issue labelling becomes most controversial in characterizing the citizen's interests.³⁰

29. Indeed, despite the contradictory fame of its footnote 4, the mandate of the Court in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), was based on exactly this reluctance to more closely examine the means and ends chosen in the Filled Milk Act of 1923, under either the Due Process Clause of the Fifth Amendment or the limits of the Commerce Clause.

30. I do not mean to suggest that interest labelling is the only significant bone of contention in vocabulary debates among members of the Court. To do so would ignore countless perennial squabbles over vocabulary. One such dispute is whether an issue is moot. See, e.g., *Sosna v. Iowa*, 419 U.S. 393, 399 (1975) (finding that a one-year residence required to file for divorce was met by the time of appeal, but the appeal was not moot because appellant brought suit as a class action to litigate the constitutionality of the durational residency requirement); *contra id.* at 410, 412 (White, J., dissenting) (arguing that once a named party loses status which qualifies him to bring a class action suit, the party retains no interest in the controversy and is not acceptable as a party to prosecute the suit on behalf of the class); or whether specific conduct is state action, see *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972) (stating issuance of a state liquor license to a private club did not make the club a state actor), *contra id.* at 179 (Douglas, J., dissenting) (stating that a state-licensed private club is not ipso facto a public enterprise, but the state is responsible for acts of a private party when the state is, by its law, compelled to act); *id.* at 184 (Brennan, J., dissenting) (arguing that when a state issues a liquor license to a private club, the state becomes an active participant in the club); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974) (stating that state regulation of a utility did not make it a state actor); *contra id.* at 361-62 (Douglas, J., dissenting) (arguing that state-protected monopoly status is highly relevant in assessing the private utility's ties to the state); *id.* at 365 (Marshall, J. dissenting) (stating that the imposition of regulations by the state, the cooperation of the state with the utility, and the approval by the state add up to state action). A wran-

Two aspects of the labelling of a constitutional interest may alter its weight in the balance metaphor. The first is the level of specificity or generality used;³¹ the second is emphasis of one attribute of the argument. These flexible methods of definition are generally more troublesome in the description of interests asserted by the citizen, while the interests asserted by the state are often sufficiently acceptable to the Court in a very broad formulation.³²

(1) *The Citizen's Interest*

The effects of this vocabulary game are generally more pronounced in the characterization of the citizen's interest. Notorious examples are found in the judicial characterizations of the competing interests in *Bowers v. Hardwick*.³³ In *Bowers*, the United States Supreme Court reversed an Eleventh Circuit decision declaring that Georgia's sodomy law infringed a fundamental right of privacy, thus requiring the law to be justified by a compelling state interest.³⁴ Justice White's majority opinion characterized the citizen's interest as an interest of "homosexuals to engage in sodomy."³⁵ On the other hand, Justice Blackmun's dissenting opinion characterized the interest of the

gle touched upon in this Article is whether nude dancing is speech or conduct. Compare *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2460 (1991) (concluding that nude dancing is expressive conduct within the outer perimeters of the First Amendment) with *id.* at 2463 (Scalia, J., concurring) (arguing that law prohibiting nude dancing is not specifically directed at expression and is not subject to First Amendment scrutiny).

All of these debates confirm Bishop Hoadly's often-repeated view that "Whoever has an absolute authority to interpret any written or spoken laws; it is he, who is truly the Law giver to all intents and purposes, and not the person who first wrote or spoke them." BENJAMIN HOADLY, *THE NATURE OF THE KINGDOM OF CHURCH OF CHRIST: A SERMON PREACHED BEFORE THE KING AT THE ROYAL CHAPEL OF ST. JAMES, MARCH 31, 1717. PUBLISHED AT HIS MAJESTY'S SPECIAL COMMAND* 17 (Portsmouth, England, Pierce 1802).

31. There is a growing literature on levels of abstraction in judicial writing. See Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990). Judge Easterbrook also examined the judicial use of abstraction and the danger this use poses to judicial actions that are predictable and restrained. Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992).

32. Even so, *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and its progeny suggest that in well-defined areas, particularly in arguments implicating the dormant Commerce Clause, the Court will hold states to a very narrow definition of the state interest in the benefit of the state's citizens.

33. 478 U.S. 186 (1986).

34. *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986).

35. *Bowers*, 478 U.S. at 190. Justice White's basis for so narrowly reading *Hardwick*'s interest is based largely on a tactical error by *Hardwick*'s trial team. Because John and Mary Doe plaintiffs had faced no imminent threat of enforcement under the sodomy law, the district court dismissed their challenge to the statute's enforcement against their intent to engage in statutorily proscribed conduct in their home. Justice White concluded: "The only claim properly before the Court, therefore, is *Hardwick*'s challenge to the Georgia

citizen as an interest of both homosexuals and heterosexuals in their privacy.³⁶ Having contrarily betokened the constitutional interest in the citizen's desire to engage in proscribed conduct, Justice White's and Justice Blackmun's answers to the next enquiry—does the Constitution protect this interest as a fundamental right?—were destined. Justice White found that there is no fundamental right to engage in homosexual sodomy;³⁷ Justice Blackmun argued that the case was based on a fundamental right to privacy.³⁸ Clearly, both characterizations of the citizen's anticipated conduct were in some way appropriate. Just as clearly, the choices of Justice White and the majority, reflected in their labelling of the interest, determined the outcome of the case.

Judge Easterbrook reflected on this problem of definition in his article concerning *Michael H. v. Gerald D.*³⁹ He described the asymmetry of abstraction that leads judges to find protection of a citizen in

statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy." *Id.* at 188 n.2.

36.

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, than *Stanley v. Georgia*, 394 U.S. 557 (1969), was about a fundamental right to watch obscene movies or *Katz v. United States*, 389 U.S. 347 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone."

Id. at 199 (Blackmun, J., dissenting) (citation omitted). After reviewing the inclusive language of the Georgia statute, Justice Blackmun noted, "[Hardwick's claim] involves an unconstitutional intrusion into his privacy and his right of intimate association does not depend in any way on his sexual orientation." *Id.* at 201.

37. *Id.* at 192. Professors Stoddard, Tribe, and Dorf have called Justice White's use of precedent to support a narrow definition of Hardwick's claim as "judgment by pigeon-hole." Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 653 (1987), cited with approval in Tribe & Dorf, *supra* note 31, at 1066.

38. *Bowers*, 478 U.S. at 204 (Blackmun, J., dissenting).

39. 491 U.S. 110 (1989). The most intriguing element of the interest definition in *Michael H.* was Justice Scalia's call for defining each interest of a citizen according to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Id.* at 127 n.6. Only Chief Justice Rehnquist joined in this definition.

Justice Scalia's definition has attracted considerable criticism. Besides Judge Easterbrook's concerns, Professors Tribe and Dorf suggest that his formulation is skewed by reliance on historical recognitions of rights alone and that it surrenders judicial responsibility for the protection of individual rights. Tribe & Dorf, *supra* note 31, at 1086. One might suppose that Justice Scalia would not disagree with these concerns. However, Tribe and Dorf also argue that "there is no universal metric of specificity against which to measure an asserted right." *Id.* This criticism, which one might suppose is a more fundamental argument, is the concern of this Article as well.

broad generalized definitions of conduct, but condemnation of the citizen in narrow and specific definitions:

By choosing narrowly the Court may find no problem in the law. By choosing broadly the Court may find a problem with any law it pleases—invoking "tradition" to demonstrate that adultery and other things that society has long deprecated are actually *protected* by some traditional freedom, that practices traditionally scorned and punished are no different from practices traditionally praised
⁴⁰

Of course, the problems of an overly broad or overly narrow definition of an interest do not afflict every interest. They are, however, most acute in litigants' arguments that implicate broad and "unfocused" interests, such as privacy.⁴¹

Consequently, the selection of a level of abstraction is a judicial task especially open to manipulation. The concern of commentators is to seek models for such definitions that will constrain judges and justices who are attitudinally disinclined to protect an interest from defining it into oblivion.⁴² A naive response might be to expect the Court merely to rely on citizens' own definitions of their arguments, unless such definitions are patently inapplicable or made in bad faith. This method of definition is essentially that which is employed in ascertaining the government's opposing interests.⁴³

A slightly more sophisticated response arises from a third element of judicial choice in the definition of interests: the selection of only one interest to describe the argument. The fact that one argu-

40. Easterbrook, *supra* note 31, at 352. Similar conclusions were reached by Professors Tribe and Dorf. See Tribe & Dorf, *supra* note 31, at 1085-98.

41. The term "unfocused interests" is generally used to describe broadly defined governmental interests, and will be discussed briefly in the next Subpart. Problems of definition and motive that afflict "unfocused interests" when argued by the state may as easily afflict arguments brought by an individual.

42. The test suggested by Professors Tribe and Dorf is to bind any interest's definition to a comprehensible exposition of the rationales of the cases that establish that interest. Tribe & Dorf, *supra* note 31, at 1106 ("A too-abstract right will be recognizable as such whenever its enunciation requires us to virtually ignore the rationales of the cases which allegedly established it."). Although a useful beginning, this test suffers from many of the infirmities they suggest plague Justice Scalia's footnote 6 in *Michael H.* See *supra* note 39. It does not, without great complication, allow for the recognition of a novel right; it is tied to the linguistic usages of earlier courts; and it may well require that the interest is so narrowly fashioned (as a mere opposition to a particular statute) that the interest may not be clear from the stated rationale, leaving later courts to choose between the stated rationales and such rationales as might then seem most appropriate. Such scope in the manipulability of the definition of a "right" or an "interest" does not greatly reduce the concern that the interests may be defined dishonestly in levels of abstraction designed to obscure the interests' precedential significance.

43. See *infra* Subpart A.2.

ment alone is chosen by a lawyer arguing the opposing side or by a justice drafting an opinion does not necessarily exclude others.⁴⁴ The simple truth is that the citizen's assertion, as in *Bowers*, was of both an interest in privacy and an interest in committing homosexual sodomy.⁴⁵ Therefore, there is no reason that the Court may not evaluate every applicable definition of an interest, comparing the sum of the interests represented in one argument to the interests raised by the opposing argument.⁴⁶

(2) *The Governmental Interest*

The recent work concerning governmental interests done by Professor Gottlieb provides not only an encyclopedic review of state interests, but also the insight that the Supreme Court is as much the source of governmental interests as it is the source of individual rights.⁴⁷ This observation must underpin the sense provoked by any inventory of state interests recognized by the Court—that the idea of a governmental interest at best rests on shaky foundations, and at worst is cobbled into whatever new forms are necessary to uphold any law brought before the Court. Essentially, the Court must categorize state interests on an ad hoc basis because the Court recognizes no comprehensive definition of what the interests of the federal or state governments are to be in our constitutional law.⁴⁸ Not only do we

44. Of course, the search for the one true interest is not always a judicial quest. A rare departure from the judicial search for only one description of an interest is that taken by a district judge in *ACLU v. Mabus*, 719 F. Supp. 1345 (S.D. Miss. 1989), *judgment vacated & remanded as to remedy only sub nom. ACLU v. Mississippi*, 911 F.2d 1066 (5th Cir. 1990). In that case, the court considered the state interest in a statute sealing for 50 years files compiled by a state agency that spied on civil rights workers. After examining the legislative history of the state's act, the court found that the statute was designed to pursue two independent interests simultaneously: "to protect the privacy of those whose names were in the files and to limit liability of the Commission and its agents." *Mabus*, 719 F. Supp. at 1350. Neither of these interests was sufficient to protect the state against infirmities in the statute, which had among other effects the prior restraint of speech, the denial of access to the courts, and continued damage from constitutional torts. *Id.* at 1361.

45. Hardwick pleaded that he was a practicing homosexual in the complaint. *Bowers*, 478 U.S. at 188.

46. Such an approach is not unlike the aggregation of cumulative weights of interests proposed in Professor Faigman's view of a reconstructed Madisonian balance. See Faigman, *Madisonian Balancing*, *supra* note 4, at 661-64.

47. See Gottlieb, *Compelling Governmental Interests*, *supra* note 10. One might suppress a smile at the idea of judicial construction of governmental interests, believing that the real source of governmental interests, or at least its rhetoric, is the attorneys general who describe them in their briefs. This observation was openly made by Justice Powell. See *infra* note 52.

48. Effectively, the litigation recently before the Court suggests that there are only a few broad governmental interests: the protection of national security from foreign inter-

lack such a definition of the state, we lack any usable model against which such interests may be compared or from which they might be derived (the precedential effects of the circumstances surrounding the drafting of the Constitution, or other salient moments in history, notwithstanding).⁴⁹

In the absence of a general view of the state, the Court must individually determine the governmental interest supporting each argument brought by the state and federal governments. As a matter of doctrine, the Court does not demand that this interest reflect either the actual motive of the lawmaker or the effect of the law as it is enacted. In other words, the actual purpose of the law need not form the basis of the interest; any definition of an interest that fits may do.⁵⁰ As a practical matter, however, the Court will consider more carefully the interest asserted by a state if the opposing interest is asserted by a government rather than a citizen. In such cases, the motive and the effect may both be scrutinized, and from their amalgam the Court can narrowly define the state interest involved.⁵¹

ference; the promotion of efficient commerce; the regulation of natural resources; the just administration of law; and the promotion of the health, safety, and morals of each citizen. Within each of these broad arenas is a myriad of specific interests, such as preventing accidents at railway crossings.

49. The absence of a general theory of the state as a part of our fundamental law has fueled much of the recent efforts to provide a more detailed conception of the philosophical conceptions of the state prevalent at the time of the founding, particularly the Republicanism movement. Yet, to the extent such models are available to guide a modern reader, in the absence of any constitutional enshrinement they have only such authority as a modern reader will give them.

50. The Court has variously defined the interests of the states according to the intent of the legislature or policy maker, or the effects produced by a statute. Professor Gottlieb has considered the utility of distinguishing between these tests as tests *per se*, Stephen E. Gottlieb, *Commentary: Reformulating the Motive/Effects Debate in Constitutional Adjudication*, 33 WAYNE L. REV. 97, 114-15 (1986), concluding that the burden of proof in establishing any particular interest as an appropriate description is a more critical enquiry than whether that interest is established according to motive or effect. This Article adopts that position, with the reservations implied in the discussion of salient interests in Part IV.B.(3), *infra*. In part the conclusion that there is little difference between purpose and effects tests is suggested by the simple admonition of Justice Harlan in *Minnesota v. Barber*, 136 U.S. 313, 319 (1890): The purpose of a statute must be framed by "its natural and reasonable effect" (citation omitted).

51. Compare two cases announced in the same term evaluating a state interest. In *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981), the majority, per Justice Powell, evaluated an Iowa statute limiting trucks to sixty-five-foot lengths in the light of its legislative history, *id.* at 666 n.7, as well as its practical effects, *id.* at 674. Ultimately, the Court found no rational justification for the statute's basis in highway safety and concluded that the real interest lay in diverting interstate traffic to surrounding states. *Id.* at 677. In *Michael M. v. Superior Court*, 450 U.S. 464 (1981), on the other hand, then Associate Justice Rehnquist, joined by Justice Powell, accepted an admittedly hypothetical reason for

In general, however, the courts have abrogated much of the power to define governmental interests. The Court presumes that there is a legitimate governmental interest in every act of Congress, leaving the burden on the citizen to prove otherwise. This has resulted in occasionally amusing, if dissatisfying, moments in which the Court has been left with no better basis for assigning an interest than "the ingenuity of a government lawyer."⁵² This judicial deference is, of course, most pronounced in adjudicating arguments against federal statutes. All that is required to assign an interest to a congressional act is a plausible reason to believe that the interest supports the act.⁵³ Similar presumptions favor state statutes.⁵⁴

California's statutory rape law. After conjecturing that "[s]ome legislators may have been concerned about preventing teenage pregnancies, others about protecting young females from physical injury or from the loss of 'chastity,' and still others about promoting various religious and moral attitudes towards premarital sex," he uncritically accepted the "justification for the statute offered by the State, and accepted by the Supreme Court of California, . . . that the legislature sought to prevent illegitimate teenage pregnancies." *Id.* at 470. Alternative ideas of residual moral notions condemning premarital sex, or any attempt to consider the actual motives of the legislature, were swept away by a surfeit of citations excusing such enquiry into legislative motive. *Id.* at 469-70.

In certain circumstances, the Court requires that it consider only such interests as a state proffers. One obvious example of this self-imposed limit on the Court's general willingness to construct state interests from hypotheses is in considering state burdens on commercial speech. Applying the heightened scrutiny test of *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 564 (1980), the Court restricts its examination of the purpose served by the regulation to that suggested by the state. *See Edenfield v. Fane*, 113 S. Ct. 1792, 1798-99 (1993).

52. In *Schweiker v. Wilson*, 450 U.S. 221, 224 (1981), examining gender-biased discrimination in benefits available to recipients of social security benefits, Justice Powell observed in a dissenting opinion:

[t]he question of whether a statutory classification discriminates arbitrarily cannot be divorced from whether it was enacted to serve an identifiable purpose. When a legislative purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy choice as its absence.

In my view, the Court should receive with some skepticism *post hoc* hypotheses about legislative purpose, unsupported by the legislative history. When no indication of legislative purpose appears other than the current position of the Secretary, the Court should require that the classification bear a "fair and substantial relation" to the asserted purpose.

Id. at 244-45 (Powell, J., dissenting) (footnotes and citation omitted).

53. *See, e.g., United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("Where . . . there are plausible reasons for Congress' action, our inquiry is at an end.").

54. *See, e.g., Heller v. Doe*, 113 S. Ct. 2637, 2642, 2649-50 (1993) ("[A statutory] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.").

(3) *The Problem of Merging Definitions*

Compounding the difficulty of defining the interest of a citizen or government is the opportunity to rely upon the argument of one litigant to define the opposing argument. Thus, the citizen's only recognized interest may be defined strictly as escaping the liability of a particular government statute. Conversely, the government's interest may be defined strictly as forbidding the act that the citizen has committed or might commit.⁵⁵ The power of the bench to recast the arguments of a litigant from those proffered to one selected is so great an ability to favor one litigant over the other that, without articulable reasons, the judge may thereby select a winner.⁵⁶ While some degree of interest definition must occur through comparison to opposing interests, the role that an adverse argument plays in constitutional adjudication is already distinct. This distinction is particularly clear when one party's interest forms the basis for the Court's standard of scrutiny of the other's interest.⁵⁷

The real difficulty in the definition of interests remains that no member of the Court has ever articulated linguistic rules that have been sufficiently authoritative to be followed by other Justices. Thus we are confronted with hosts of problems in the conception of each new interest brought before the Court, and these problems individually may be solved only by judicial action over time. There is currently no interpretative rule governing whether citizens' interests should be defined either according to the narrowest conceivable definitions or according to broad conceptions based on attributes of conduct or motive, such as privacy, expression, employment, education, or political participation.

Another issue is whether the same rules should be applied to the state as to the citizen. The Court currently holds the motive of the individual up to much greater scrutiny than it does the motive of the state. Although one might suppose that the citizen and state would be treated equally, it is more accurate to admit that the very fact that the litigant is the government entitles it to numerous presumptions un-

55. Perhaps such narrow, and specific, definition of rights is what Justice Scalia had in mind in footnote six of *Michael H.* See *supra* note 39. Justice Scalia certainly seeks to define, at least in part, the citizen's right by the governmental and traditional conceptions of that right. See Tribe & Dorf, *supra* note 31, at 1096-97.

56. This form of "judicial refinement" of a litigant's argument may, but need not, be overtly characterized on the record, as it might be in trial courts in response to issue-dispositive motions or in appellate courts in granting jurisdiction or certiorari limited to certain issues.

57. See *infra* Subpart B.

available to mere citizens. Thanks to its license to offer any plausible justification for a law, the government does not bear the burden of articulating specific interests that reasonably explain the historical or actual basis for the operation of a law in society.

B. Restrictions on Governmental Interests and the Role of Scrutiny

The Constitution imposes two essential limits on a governmental interest: The interest may not impermissibly infringe on protected individual rights, and the interest asserted by one organ of government may not exceed the scope of that organ's authority. The first of these limits has received the greater attention from commentators, although our understanding of each limit is obviously informed by our awareness of the other. Critically, both areas of enquiry serve as bases for the establishment of the standard of review under which a governmental interest will be assessed in balancing opinions.

(1) External Views of the State Interest: Limits Imposed by Individual Rights

Neither the state nor the federal government may impair the protected rights of individuals without a sufficiently important interest to justify the impediment. Although the Court does recognize some nearly absolute rights, such as those that are protected in Article IV's Privileges and Immunities Clause⁵⁸ and the Bill of Attainder Clauses,⁵⁹ these clauses protect the authority of other departments of the federal system as much as they guard personal liberties. Essentially, no constitutionally recognized right remains absolute for its own sake. Thus, in order to prevail against a "fundamental" individual right, an argument asserted by a government agency must be supported by a more important interest. These considerations are suffi-

58. Article IV, Section 2 of the Constitution provides, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Although the Court currently employs a categorical test to determine whether the Privileges and Immunities Clause has been violated, *see Hicklin v. Orbeck*, 437 U.S. 518 (1978) (holding that Art. IV, § 2 bars Alaska citizen preference in hiring oil workers), a state infringement of the clause is still forbidden unless the state can satisfy the Court that its statute is designed to remedy an evil created by people from out of state, *see id.* at 526. This is very difficult to do. *See, e.g., Barnard v. Thorstenn*, 489 U.S. 546, 553, 558-59 (1989) (holding that Art. IV, § 2 bars exclusion of nonresidents from license to practice law in U.S. Virgin Islands despite arguments of difficulty of court docket management caused by an absentee bar).

59. Article I, Section 9 of the Constitution forbids Congress from enacting any Bill of Attainder, and Article I, Section 10 forbids the states from doing so.

ciently vast and are so thoroughly treated by other writers that they are raised here only in passing.

(2) *External Views of the State Interest: Limits Imposed by Federalism and Separation of Powers*

Neither the state nor an organ of the federal government may validly act beyond the constitutional boundaries established by the doctrines of federalism and separation of powers. These limitations are formidable barriers to the assertion of any interest by a state, which may not trammel upon the federal domain, and by the federal government, which may not assert an interest for one branch if that interest is exclusively in the province of another. When one department of government crosses these lines, especially when a state asserts an interest that offends the notions of federalism, the justifications for the interest in doing so must be powerful indeed.⁶⁰ These ideas are, of course, old hat. They are raised here because the methods by which the Court examines interests in these contexts are, generally speaking, less controversial than the methods employed in examining interests in opposition to an interest asserted by a citizen.⁶¹

(3) *Internal Views of the State Interest: Due Process and Equal Protection*

Within the federal and interbranch limits on governmental interests, two critical forms of constitutional review allow the courts to consider the operation and effectiveness of an interest: the requirements of due process and equal protection of the laws.⁶² In reviewing the interests asserted by government lawyers, the Court employs a range of methods. Particularly, the Court considers whether the inter-

60. See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322, 336-38 (1979) (finding that an Oklahoma statute banning the export of minnows, which on its face discriminated against interstate commerce, failed to support, by "strictest scrutiny," a legitimate local benefit by the least burdensome means).

61. Rarely does one find an interest more carefully defined than when that interest is asserted at the expense of an exercise of power by the federal judiciary. The finest example of scrutiny at such a moment is, of course, *United States v. Nixon*, 418 U.S. 683, 713 (1974), in which the President's interest in confidentiality failed to outweigh a judicial interest in developing the facts of a judicial proceeding.

62. Of course, these apply against the states through the Fourteenth Amendment. As for the federal government, the Fifth Amendment provides the due process restriction, while equal protection is assured through the "reverse incorporation" wrought by *Bolling v. Sharpe*, 347 U.S. 497 (1954). Even so, this is not to say the federal courts look equally carefully in reviewing the enactments of a state legislature and the Congress. As one might expect given the dictates of coordinate deference, there is far greater federal scrutiny of state assertions of interests than of federal government assertions. See Black, *supra* note 21, at 35.

est is permissible, whether the interest is consistently supported by the bulk of the laws not before the court, and whether the interest is completely inefficacious. In certain circumstances, the courts will also consider whether the law enshrining the interest employs logically necessary classifications and whether there are less burdensome or less intrusive means of accomplishing the interest than those in the statute.

(a) Permissible Interests

Some interests a state may assert are sufficiently destructive of the rights of citizens or of the constitutional structure to be impermissible. While the Court generally employs the balance metaphor in reaching such a conclusion, the effect is nearly a categorical exclusion. A paradigmatic illustration of this concept is that of *NAACP v. Alabama*,⁶³ in which Justice Harlan measured the state interest in securing names of the members of an organization promoting desegregation against the rights of association of those members. He concluded a cursory and nearly euphemistic examination of the state's claim by noting, "Whatever interest the State may have in obtaining names of ordinary members has not been shown to be sufficient to overcome petitioner's [rights to speech, assembly, and association]."⁶⁴

A more recent example of an impermissible state interest in denying civil liberties is the finding of the district court in *ACLU v. Mabus*⁶⁵ that the asserted state interest in protecting citizens' and officials' reputations by sealing records of a state agency created to spy on civil rights activists was not a legitimate interest, but rather was a subterfuge for continuing violations of a panoply of the civil rights' workers constitutional rights.⁶⁶ Simply put, when the motives of the government are essentially to violate constitutional limitations, they are impermissible.⁶⁷ This is so whether the motive is discerned from the actual motive of lawmakers or from the effect of their laws.

63. 357 U.S. 449, 463-65 (1958).

64. *Id.* at 465.

65. 719 F. Supp. 1345 (S.D. Miss. 1989), *judgment vacated & remanded as to remedy only sub nom.* *ACLU v. Mississippi*, 911 F.2d 1066 (5th Cir. 1990).

66. *Id.* at 1361.

67. For a more thorough treatment of this limitation on state action, see Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 116.

(b) Comparison to Other Laws for Consistency

One of the most useful methods of internally reviewing an interest ascertains the extent of state support for that interest. In other words, the Court will compare the interest to various laws enacted by the state and require an essentially consistent pursuit of that interest by the state. In *Bernal v. Fainter*,⁶⁸ the Court, per Justice Marshall, reviewed a Texas citizenship requirement for notaries and found that the asserted bases for finding a notary to be a public official did not comport with the remaining requirements of a notary applicant. In *Parham v. Hughes*,⁶⁹ the Court analyzed a Georgia statute forbidding a father who has not legitimated a child from suing for the wrongful death of the child, to determine whether the statute violated the Equal Protection or Due Process Clauses. In support of the statute, Georgia argued that it was not based on an interest in burdening illegitimate children but upon an interest in limiting litigation.⁷⁰ The Court compared the wrongful death limitation statute to other Georgia statutes to ascertain that the wrongful death statute was not a burden or stigma based upon bastardy.⁷¹

Thus, one method by which the courts may examine the limits of an interest, as a description of the argument supporting particular laws, is to compare the relationship among the laws before the court to laws that implicate that interest elsewhere in a state's legal scheme. If the other laws contradict the asserted interest, the interest is not rationally pursued by the state, and the state should not be able to assert it in support of its law.

(c) Efficacy: Logical Comparison of the Means to the End

Another method of interest analysis is to examine the efficacy of the laws that support the interest, when these laws are those the interest is meant to support. Although efficacy is required in many areas,⁷² the Court has classically employed this mechanism under the aegis of equal protection.⁷³

68. 467 U.S. 216, 223-28 (1984).

69. 441 U.S. 347 (1979).

70. *Id.* at 357-58.

71. *Id.* at 353.

72. *See, e.g.,* *Hodgson v. Minnesota*, 497 U.S. 417, 455 (1990) (overturning an abortion law requiring two-parent notice).

73. In general, unless a "suspect classification" is at issue, the only requirement for satisfying the dictates of equal protection is that a statute's classifications be logically related to legitimate ends. *Dallas v. Stranglin*, 490 U.S. 19, 23 (1989). Thus, in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448-50 (1985), a zoning ordinance that

In *Orr v. Orr*,⁷⁴ the Court considered an Alabama divorce law requiring that husbands, but not wives, could be ordered to pay alimony. Justice Brennan considered the state's argument for the gender-based classification as part of a state interest in helping the needy spouse after a marriage dissolves. He found that the state's refinement of the interest as protecting only wives—because of past discrimination against women—was not logically related to the protection of the needy spouse. The only women who would in fact benefit under the statute were wealthy women who were least likely to have been the personal victims of discrimination.⁷⁵

The test for efficacy is the simplest form of review of a law for a rational relationship between the means of the law and its stated purpose. As Justice Brennan explained, it becomes almost a test of good faith for the government representative defending a statute: "Of course, if upon examination it becomes clear that there is no substantial relationship between the statutes and their purported objectives, this may well indicate that these objectives were not the statutes' goals in the first place."⁷⁶

required a special use permit for "hospitals for the feeble-minded" could not be sustained when the city could not demonstrate any rational basis for distinguishing the mentally ill from other city residents in a way that implicated the city's legitimate interests. *Cleburne* is, however, an unusual case.

74. 440 U.S. 268 (1979).

75. Justice Brennan's illustration made the point inescapable:

[U]se of a gender classification actually produces perverse results in this case. As compared to a gender-neutral law placing alimony obligations on the spouse able to pay, the present Alabama statutes give an advantage only to the financially secure wife whose husband is in need. Although such a wife might have to pay alimony under a gender-neutral statute, the present statutes exempt her from that obligation. Thus, "[t]he [wives] who benefit from the disparate treatment are those who were . . . nondependent on their husbands." They are precisely those who are not "needy spouses" and who are "least likely to have been victims of . . . discrimination" by the institution of marriage. A gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny.

Id. at 282-83 (citations omitted).

76. *Id.* at 280 n.10 (citing John Hart Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155 (1978)). In this usage, I believe he meant "goal" to be synonymous with interest, as it would make little sense in the context of the rest of his opinion in *Orr* to construe it solely as intent. The editors of this Article suggested in reviewing the draft an excellent example of a constitutional obligation of a state to establish a logical relationship between its purpose and its regulation. In *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987), Justice Scalia required a tightly fit "nexus" between a condition on a building permit and the purpose for the condition.

(d) Less Intrusive Means Tests

The test for less intrusive means has been applied only in more strict standards of review, although it is closely related to the test for efficacy. Here the idea of efficacy, that the means chosen will lead to the end chosen, is expanded to include the requirement that the means be the least constitutionally offensive available to achieve the interest. Thus, while a restriction against exporting fish was overturned in *Hughes v. Oklahoma*⁷⁷ because the state's legitimate conservation interests in fish population could be met by means less burdensome to commerce, a fish import ban was upheld in *Maine v. Taylor*⁷⁸ because the conservation interest in preventing the introduction of foreign parasites to the local fish could not be met by any less burdensome method.

(e) Logical Form of Classifications: Under- and Over-Inclusion

The essential enquiry made of a state interest under the Equal Protection Clause is whether a classification created by a law supporting that interest is permissible. A critical step in the determination that a state's classification is permissible is to ascertain whether the classification rests upon some reasonable basis. An essential facet of such reasonableness is that distinctions between those benefited and those burdened must be, by some means, reasonable.⁷⁹ This principle is now generally known as a ban on unreasonable underinclusion or overinclusion.⁸⁰

A fine illustration of the principle was made in Justice O'Connor's opinion in *City of Richmond v. J.A. Croson Co.*,⁸¹ which invalidated a city contract set-aside plan requiring 30% of subcontracts to be awarded to minority business enterprises. The city ordinance defined minority business enterprises as companies owned by U.S. citizens who are "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."⁸² The city's argument for its plan was based on

77. 441 U.S. 322 (1979).

78. 477 U.S. 131, 151-52 (1986).

79. An early illustration of this principle is *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 153, 165-66 (1897), in which the Court, through Justice Brewer, struck down a Texas fee-shifting statute that applied only against railroads, thus singling out a certain class of debtors and punishing them when, for like delinquencies, it punished no others.

80. See Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344-53 (1949), which particularly advanced these terms. Underinclusion as a basis for equal protection relief was classically discussed in Justice Harlan's concurrence in *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring).

81. 488 U.S. 469 (1989).

82. *Id.* at 477-78 (citing RICHMOND, VA., CITY CODE §§ 12-156(a), 12-23 (1985)).

an interest in remedying its past discrimination in construction contracting awards, although the only evidence of such discrimination was public school segregation between Blacks and Whites.⁸³ But not only was there no evidence of discrimination in contracting against Blacks, there was no evidence of discrimination against Latino, Oriental, Indian, Aleut, or Eskimo contractors.⁸⁴ Thus, the ordinance was dramatically overinclusive.

Granted, a test of an interest based on the reasonableness of a classification in an interest-related statute may only occur when a citizen challenges that statute under the Equal Protection Clause. Even so, the fundamental enquiry of comparing the reasoning behind the statute, whether seen from the perspective of its drafting or of its operation, is certainly a test for reasonableness of the interest.

C. The Limits of Interest Analysis

Undoubtedly, the most critical moment of the comparison of two constitutional arguments is the point at which an interest is defined and so used to encompass the argument. There is little authoritative limitation on the means by which this is done, other than the intellectual and doctrinal limitations privately chosen by justices and judges themselves. It would be useful for the Court to adopt a rule of interest definition, particularly one by which an interest, once defined, must encompass the whole of the argument procedurally before a court, and no less. This is not yet, and may never be, the case.

Once an argument has been defined into an interest, or even into several interests, the Court has developed methods for evaluating the sufficiency of the statute (or other law at issue) in fulfilling that interest. The few limitations that are external to the interest, the boundaries guarding the domains of citizens and dividing departments of the government, determine how carefully or how cavalierly the Court will consider the internal limitations. Despite the array of available internal techniques to evaluate a state interest, they are still used in a relatively piecemeal fashion. Certainly, at higher standards of review, the Court applies certain tests it usually omits at lower standards. Nevertheless, which tests are to be applied at the higher standards vary not according to the standard, but according to the interests and laws then in issue. Of course, these techniques of interest evaluation are more clearly articulated when they are applied at higher standards of re-

83. *Id.* at 498-99.

84. *Id.* at 505-06.

view. They are also more likely to be applied with greater force against the state. Even so, neither the greater degree of articulation nor the stronger presumption against the state at high standards of scrutiny logically require an omission of these techniques at lower levels of scrutiny. The Court remains unwilling to acknowledge that these techniques are each a necessary element of any realistic understanding of a "rational relationship" between an interest and the means employed to satisfy it.

As a result, the nature both of the process of defining an interest and of testing its rational relationship to the laws that support it are relatively unknown. Significantly, the lower courts are thus left with little guidance, and the system as a whole is insufficiently predictable. Furthermore, the failure to provide a thorough conception of *rationality* for a rational review means that a series of laws that are based on broad standards that do not greatly trammel external limitations are effectively beyond review. This effect leads to a corresponding lack of flexibility in the judicial system. With the loss of predictability and flexibility, the authority of the legal system as a whole is diminished. Without a more comprehensive approach to the analysis of interests, the irrational, attitudinal, or ad hoc approach must govern, leaving an appearance of both unpredictability and illegitimacy. The next Part illustrates this mire by reviewing cases of the state enforcement of morality through the police powers.

III. Police Powers: The State Interest in Good Morals

Many opinions of the Supreme Court involve the conflicts between citizens and a state when the state has exercised its "police powers" to forbid immoral acts. Two of the more famous opinions support such laws in *Barnes v. Glen Theatre, Inc.*,⁸⁵ forbidding nude dancing, and in *Bowers v. Hardwick*,⁸⁶ forbidding sodomy. The principal analytic difference between the two opinions is that the *Barnes* Court described, if begrudgingly, the citizens' claim as within the fundamental rights of the First Amendment.⁸⁷ In contrast, the *Bowers* majority accorded no constitutional recognition to the citizen's con-

85. 111 S. Ct. 2456 (1991).

86. 478 U.S. 186 (1986).

87. "[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." *Barnes*, 111 S. Ct. at 2460.

duct.⁸⁸ Despite the different presumptive balance, the Court upheld the states' claims in both cases.

A wealth of commentary followed these cases, mostly attending to the nature of the citizens' rights at issue in each case.⁸⁹ Nevertheless, relatively little concern has been given to the nature and limits—in other words the weight—of the state interest that outweighed these personal interests: police powers.

A. The Development and Nature of the Police Power Generally⁹⁰

The term "police power" as a rubric for the interest of the state, either in punishing its citizens or in using regulatory means to prevent their conduct, was well known to both colonial and early federal constitutional scholars as a doctrine of the English common law. The doctrine was described by Blackstone in his *Commentaries*,⁹¹ by Adam

88. *Bowers*, 478 U.S. at 192; see *supra* note 37 and accompanying text.

89. For representative discussions of *Bowers*, see *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 210 (1986) (describing the general view as a limit on the right to privacy); Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19, 75 (1991) (arguing that Justice White's opinion in *Bowers* represents an appropriate limit on the increasingly privatized views of the Establishment Clause); David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 860-61 (1986) (arguing that the proper interpretation of the right to privacy is contrary to Justice White's result in *Bowers*).

For representative discussions of *Barnes*, see *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 287-97 (1991) (free expression limit); Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611 (1992); Gianni P. Servodidio, Comment, *The Devaluation of Nonobscene Eroticism as a Form of Expression Protected by the First Amendment*, 67 TUL. L. REV. 1231, 1247-54 (1993).

90. The historical development and intellectual history of the police powers is too vast a topic to be considered in the brief space here devoted to a rough sketch of the basis and parameters of police powers. There is a paucity of modern scholarship in this rich field, although the best work to date is by Professor Novak. See WILLIAM NOVAK, *INTELLECTUAL ORIGINS OF THE STATE POLICE POWER: THE COMMON LAW VISION OF A WELL-REGULATED SOCIETY* (University of Wisconsin Legal History Working Paper No. 3-2, 1989).

91. In his catalog of public wrongs, in the division of offenses "affecting the commonwealth," Blackstone described offenses

against the public *police* and *economy*. By the public police and economy I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighborhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations. This head of offenses must therefore be very miscellaneous, as it comprises all such crimes as especially affect public society, and are not comprehended under any of the four preceding species [offenses of misprision, and against justice, peace, and trade].

Smith in his lectures,⁹² and cursorily applied in crown courts at the time of American independence.⁹³ Attention to the doctrine was not limited to the common-law tradition, and American lawyers were aware of French formulations of the doctrine as well.⁹⁴

4 WILLIAM BLACKSTONE, COMMENTARIES *162 (spelling modernized, emphasis in original). Blackstone's formulation was quoted frequently in applications of the doctrine on the American bench. See, e.g., *Dunn v. Commonwealth*, 49 S.W. 813, 814 (Ky. 1899) (holding that a statute banning prostitutes from the streets between 7 p.m. and 4 a.m. was a valid exercise of police powers); *State v. Bott*, 31 La. Ann. 663, 666-67 (1879) (holding that a prohibition of alcohol sales on Sunday is within the police power of the state to preserve the public order); *Watertown v. Mayo*, 109 Mass. 315, 318 (1872) (holding a slaughterhouse zoning law a valid exercise of state police power); *State v. Mountain Timber Co.*, 135 P. 645, 646 (Wash. 1913) (holding that an early workman's compensation statute was a valid exercise of state police power); *Hunter v. Green*, 194 So. 379, 380 (Fla. 1940) (holding that undertakers were properly regulated by town under delegated police power).

Among the offenses against the public police and economy, Blackstone listed clandestine marriage, bigamy and polygamy, vagrancy by soldiers and sailors or their impostors, and the unregulated acts of gypsies, which were all enforced as felonies and punishable by death. See 4 BLACKSTONE, *supra*, at *163-66. Misdemeanors included the commission of common nuisances (as opposed to private nuisances, which are not dangerous but to one person), keeping or promoting "disorderly inns or alehouses, gaming-houses, bawdy-houses, stage-plays, unlicensed, booths and stages for rope-dancers, mountebanks, and the like," or lotteries; innkeepers refusing guests without good cause; fireworks; eavesdropping; and scolding women. *Id.* at *166-68. Other misdemeanors against the public included idleness (then divided by statute into three classes: "disorderly persons, rogues and vagabonds, and incorrigible rogues," *id.* at *169); luxury and overconsumption of food, or in dress; improper gaming; and the taking of beasts and fowls as game without license. *Id.* at *170-75.

92. Smith was less interested in the moral side of the police powers coin than was Blackstone. "[Police] comprehends in generall three things: the attention paid by the public to the cleanliness of the roads, streets, etc., 2d, security; and thirdly, cheapness or plenty, which is the constant source of it." ADAM SMITH, LECTURES ON JURISPRUDENCE 331 (R.L. Meek et al. eds., 1978) (lecture of March 28, 1763). Smith expected the police regulation of plenty to direct the efficient division of labor and encourage cheap prices for commodities and goods. *Id.* at 488-97.

93. One of two central maxims of the police powers, *salus populi suprema lex* ("the welfare of the people is the highest law"), was casually applied on the King's Bench in 1792 to bar a suit for damages to property brought against a road commissioner appointed under a paving statute. *British Cast Plate Mfrs. v. Meredith*, 100 Eng. Rep. 1306, 1307-08 (K.B. 1792). The maxim long retained its popularity in American courts. See, e.g., *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 476 (1934) (Sutherland, J., dissenting).

94. Montesquieu developed a division of regulatory authority that distinguished police authority from criminal authority because police prosecutions were generally not so severely punished, and because exercise of the police authority gave greater discretion to the magistrate, who correspondingly was more blameworthy for violations of police laws. 2 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 79 (Thomas Nugent trans., New York, The Colonial Press, rev. ed. 1899) (1748). Montesquieu's influence in the early United States, particularly via *The Spirit of Laws*, was considerable. He was read by Madison and most colonial lawyers, and translations of a critical commentary on his works were sponsored by Thomas Jefferson. See FORREST McDONALD, NOVUS ORDO SECLORUM (1985); Letter from Thomas Jefferson to William Duane (Aug. 12, 1810), in 12 THOMAS JEFFER-

Legal commentators in the early federal period described the concept of police powers in terms consonant with the English common-law tradition, essentially substituting the state as the sovereign, so that the state was bound to determine proper morality in the service of the community.⁹⁵ Later in the century, however, the attention of treatise authors moved from generic and theoretical description to the analysis of American judicial opinions, particularly state court opinions. Most notable was the analysis of Chief Justice Lemuel Shaw's opinion in *Commonwealth v. Alger*.⁹⁶ Subsequently, scholarly

SON, THE WRITINGS OF THOMAS JEFFERSON 404, 407 (Andrew Lipscomb ed., 1904); Letter from Thomas Jefferson to William Duane (Sept. 16, 1810), in 12 JEFFERSON, *supra*, at 413. It must be said, though, that both Jefferson and Madison were reserved in their appreciation of Montesquieu's project as a whole.

95. See 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 3 (George F. Comstock ed., Boston, Little, Brown 1867).

96. 61 Mass. (7 Cush.) 53 (1851); see THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 573 (Boston, Little, Brown, 2d ed. 1871). Although Judge Cooley directed most of his attention to analysis of cases in the state and federal courts, he applied them within the definition and categories of analysis of police powers initially employed by Jeremy Bentham. *Id.* at 572 n.1 (citing JEREMY BENTHAM, GENERAL VIEW OF PUBLIC OFFENCES 157 (Edinburgh 1823); this quotation, however, seems more likely to have come from *The Division of Offenses*, in 3 JEREMY BENTHAM, GENERAL VIEW OF A COMPLETE CODE OF LAWS 169 (Bowring ed., 1843) [hereinafter BENTHAM, GENERAL VIEW]; this essay was initially published by Etienne Dumont in French, and seems to have been drafted in the early 1780s).

Interestingly, Cooley followed a view of Bentham's that Bentham had already repudiated in part. By 1789, Bentham had come to consider the term "police" to be "too multifarious to be susceptible of any single definition," and in *An Introduction to the Principles of Morals and Legislation* he rejected the divisions and definition of "police power" he had proposed in his *General View*. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 198 (J.H. Burns & H.L.A. Hart eds., The Athlone Press 1970) (1789) [hereinafter BENTHAM, PRINCIPLES]. The definition used in *General View* had included eight distinct powers in a "general . . . system of precaution, either for the prevention of crimes or of calamities," including the power to prevent offenses, calamities, and disease, to regulate charity, communications, and amusements, and to promote police intelligence and public registration. COOLEY, *supra*, at 573 (quoting BENTHAM, GENERAL VIEW, *supra*). In *Principles*, Bentham settled for a more amorphous conception, as he could not easily continue to distinguish between crime-preventing and calamity-preventing:

The inconveniences of uniting the two branches under the same denomination, are however, the less, inasmuch as the operations requisite to be performed for the two purposes will in many cases be the same. Other functions, commonly referred to the head of police, may be referred either to the head of that power which occupies itself in promoting in a positive way the increase of the national felicity, or of that which employs itself in the management of the public wealth.

Id. at 198 n.u (citing BENTHAM, PRINCIPLES, *supra*). In *Principles*, however, Bentham still considered the content of police powers to be sufficiently understandable to serve as the basis for defining modern crimes, or

offences against the preventive branch of the police, such offences whereof the tendency is to impede or misdirect the operations of that power which is em-

attention focused on federal opinions, beginning with those of Chief Justice John Marshall.⁹⁷

In *Alger*, the court upheld a Boston harborfront zoning law, reasoning that any private interest in property was subject to reasonable regulation to prevent injury to rights of the community.⁹⁸ In that opinion, Chief Justice Shaw defined the police power as

power vested in the Legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.

It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise.⁹⁹

Applying resonant definitions, the Supreme Court expanded the doctrine through the nineteenth century from a power that the state may exercise¹⁰⁰ to an inalienable power which the state could not

ployed in guarding against mischiefs resulting from the delinquency of internal adversaries, by expedients that come to be applied before-hand; or of that which is employed in guarding against the mischiefs that might be occasioned by physical calamities.

Id. at 200-01 (emphasis omitted). Bentham moved even further from a rigorous distinction between criminal and police powers in his brief mention of the police powers in his later *Of Laws In General*. See JEREMY BENTHAM, *OF LAWS IN GENERAL* 205 (H.L.A. Hart ed., 1970).

97. 4 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 278-81, 585 (1919); see *Gibbons v. Ogden* 22 U.S. 1 (9 Wheat.) (1824) (holding that federal commerce power overrode a state grant of monopoly of river trade); *Wilson v. The Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829) (holding that a state is empowered to dam a navigable creek). Later Supreme Court argument frequently referred to *Gibbons* and *Black Bird Creek* as discussions of permissible state powers that could constitutionally burden the commerce and navigation of the states. See, e.g., *Smith v. Turner*, 48 U.S. (7 How.) 283, 398-99 (1849) (discussing whether *Gibbons* extinguished state concurrent commerce power). Marshall appears first to employ the term "police powers" in his opinion in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443-44 (1827) (holding that a state could not levy an import tax), in describing the power of the state to regulate the storage and movement of gunpowder.

98. *Alger*, 61 Mass. (7 Cush.) at 84-85.

99. *Id.* at 85. Shaw's refusal to bind his definition in particular ambits seems to echo Bentham's reaction to the same problem. See *supra* note 96. The idea of a limitless nature of the police power found many later adherents. See, e.g., *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911) (Holmes, J.) ("It may be said in a general way that the police power extends to all the great public needs."); *Champer v. City of Greencastle*, 35 N.E. 14, 18 (Ind. 1893) ("[I]t is known when and where it begins, but not when and where it terminates.").

100. *Black Bird Creek*, 27 U.S. (2 Pet.) at 251 (holding state authority sufficient to dam navigable waterway).

divest,¹⁰¹ although the states could be flexible in exercising this power.¹⁰² Throughout this time, the scope of laws enacted under the police power grew large in the increasingly detailed state codes.¹⁰³ By the New Deal, commentators willingly expanded the methods of police powers exercise from regulation and prohibition to include the

101. See, e.g., *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 751 (1884) (stating that the legislature must not limit its power to protect the general welfare).

102. See *L'Hote v. New Orleans*, 177 U.S. 587, 596 (1900) (holding that a city ordinance banning prostitutes from most, but not all, of the city was within the police power).

103. The high-water mark of police powers as a progressive force flowing in public channels may have been reached in the work of University of Chicago Professor Ernst Freund. See ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904). Freund considered the police power, in part, as a mechanism of encouraging personal morals to have a content that furthers other state purposes; thus, the morals of the citizen are a means to a state end:

The police power restrains and regulates for the promotion of the public welfare, the natural or common liberty of the citizen in the use of his personal faculties and of his property.

The state may also promote the public welfare through . . . its corporate capacity. . . . The political community . . . wields a great moral influence as the center and depository of national and popular interests, traditions and aspirations. These corporate and moral capacities may be placed by the state in the service of any of the great objects of government, and none can be pursued without their aid.

Id. at 17. At its narrowest conception, Freund wrote that the police power promotes the "primary social interests: safety, order, and morals." *Id.* at 7. The effectiveness of the exercise of police power, Freund insisted, would still depend on that exercise being consonant with individual liberty. *Id.* at 11-12.

The types of statutes Freund believed were described by the police powers included a vast array of laws. The contents of his treatise includes laws promoting the following:

Peace and security from crime, including prohibitions of riots, thieves, vagabonds, and vagrants, and regulating ex-convicts, immigrants, and weapons, *id.* at x;

Safety and health, regulating safety in mines, transportation by sea and rail, dangerous sports and destructive animals, and regulating sanitation with regard to marriage, dead bodies and funerals, food, employment and medicine, *id.* at x-xi;

Public order and comfort, regulating the use of streets and public places, offensive behavior, unsightly property, use of the flag, and Sunday observance, *id.* at xii-xiii;

Public morals, including gambling, alcohol, vice, and brutality, which in turn included sexual vice, lewdness and obscenity, illicit sexual intercourse (of which prostitution is but one type), brutal sports and cruel treatment of animals, and stage censorship, *id.* at xiii-xv; and

Control of dependents, including control of the insane, minors, and paupers, *id.* at xv.

He also included chapters on eight areas of commercial regulation, including fraud, debtors, monopolies, future interests in property, public interest corporations, rights in waters and wildlife, and paternal laws for one's benefit. *Id.* at xvi-xxi. This inventory, while more detailed than most, followed a common scheme. See, e.g., CHRISTOPHER G. TIEDEMAN, *A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES* (2d ed. 1900).

governmental provision of services.¹⁰⁴ The emphasis in early twentieth-century discussions, however, was decidedly more focused on the states' powers to regulate contracts, employment relationships, and the use of property.¹⁰⁵ Indeed, during the New Deal, the foundation was laid for the use of the Commerce Clause as the constitutional underpinning for a federal police power.¹⁰⁶

In the years following World War II, numerous cases have been heard by the Court in which a private interest has been pitted against an exercise of state police powers. The presumption applied by the Court is that each exercise of the state police power is valid.¹⁰⁷ Although the police power is often used to support statutes that require criminal prosecution for willful acts in violation of a statute, much police legislation is regulatory.¹⁰⁸ These broad areas of regula-

104. See HENRY ROTTSCHAEFER, *HANDBOOK OF AMERICAN CONSTITUTIONAL LAW* 452 (1939).

105. In Charles Warren's 1935 book *Congress, the Constitution, and the Supreme Court*, the only area of federal review of state legislation considered in any detail was in his chapter "Labor and the Supreme Court," in which, among other observations, he noted that contrary to popular belief of the Court's anti-labor inclination, the Court had then upheld 60 state labor statutes favoring workers, while striking down only six. CHARLES WARREN, *CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT* 233-38 (1935).

106. See Alan N. Greenspan, Note, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019 (1988) (considering the development of the commerce clause as a vehicle for the exercise of a federal police power over, among other areas, civil rights, food and drug standards, and the regulation of nuclear energy, hazardous materials, labor, and natural resources).

107. Various exercises of state police power stand on "equal footing," all being "entitled to the same presumption of validity when challenged under the Due Process Clause of the Fourteenth Amendment" and all being of "equal dignity when measured against the Commerce Clause." *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529 (1959) (holding an Illinois statute requiring a special contour mudguard to be unconstitutional because it was too great a burden when other states required straight mudguards).

108. The restraint and punishment of crime is one of the most significant of the state police powers and is not based on a conceptually distinct constitutional doctrine. See *Sutton v. New Jersey*, 244 U.S. 258, 260 (1917) (considering the use of plainclothes detectives to enforce criminal statutes a valid use of the state police powers). Judicial reference to the state interest in law enforcement is, as a matter of constitutional doctrine, simply a reference to a category of the police power. See Kate Stith, *The Government Interest in Criminal Law: Whose Interest is it Anyway?*, in GOTTLIEB, *PUBLIC VALUES*, *supra* note 10, at 137, 141-43.

At least one modern writer who has considered the theoretical distinction between police and criminal exercises of power, Hans Kelsen, has explained the distinction by noting that exercises of police power are those that are not conditioned on human conduct, while exercises of the sanctioning power are only brought about as a consequence of a citizen's action:

In all civilized states, administrative organs are . . . authorized to evacuate forcibly inhabitants of houses that threaten to collapse, to demolish buildings in order to stop the spread of fires, to slaughter cattle stricken with certain diseases, to intern

tion have changed little from the late nineteenth century and still include, for example, the regulation of public health,¹⁰⁹ zoning and land use,¹¹⁰ the state's economy,¹¹¹ environment,¹¹² and trades.¹¹³

B. Police Regulation of Good Morals

The most controversial arena of police powers regulation is the enactment of laws to promote good public morals. In this century, state laws have been upheld regulating revolutionary and obscene speech,¹¹⁴ gambling,¹¹⁵ the sale of alcohol,¹¹⁶ prostitution,¹¹⁷ and even idleness.¹¹⁸ According to the doctrine, the content of morality subject to enactment as law is flexible over time,¹¹⁹ and, within the limits of

individuals whose physical or mental condition is a danger to the health or life of their fellow citizens. . . .

These coercive acts—to which administrative organs, especially organs of the police, are authorized—differ from sanctions, . . . in that they are not conditioned by a certain human conduct against which the coercive act, as a sanction, is directed.

HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 278-79 (1961).

109. *See, e.g.,* *Nebbia v. New York*, 291 U.S. 502 (1934).

110. *See, e.g.,* *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

111. *See, e.g.,* *United States v. National Dairy Prods. Corp.*, 372 U.S. 29 (1963).

112. *See, e.g.,* *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

113. *See, e.g.,* *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156 (1973).

114. Regarding revolutionary speech, *see, e.g.,* *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Regarding obscene speech, *see, e.g.,* *Miller v. California*, 413 U.S. 15 (1973); *Osborne v. Ohio*, 495 U.S. 103 (1990).

115. *See, e.g.,* *Salsburg v. Maryland*, 346 U.S. 545 (1954) (holding that interstate regulation of gambling is constitutionally a matter appropriately in the federal domain). In *The Lottery Case*, 188 U.S. 321, 356-57 (1903), the Court, per Justice Harlan, upheld a prosecution under the National Lottery Act of 1895 that outlawed transport of lottery tickets in interstate commerce or through the mails, in order to guard against "the widespread pestilence of lotteries."

116. *See, e.g.,* *The License Cases*, 46 U.S. (5 How.) 504 (1847), in which state laws requiring a license to sell liquor were first sustained. Chief Justice Taney ruled that a state may regulate its commerce compatibly with supreme federal power of interstate commercial regulation. *Id.* at 582 (opinion of Taney, C.J.). However, the opinions of Justices McLean and Grier sought to avoid the federal allocation of authority by resting the decision on the laws as police power regulations, which were (to them) independent of the regulation of commerce. *Id.* at 588 (opinion of McLean, J.); 631-32 (opinion of Grier, J.). This power is now expressly in state domain under the Twenty-First Amendment. *See, e.g.,* *City of Newport v. Iacobucci*, 479 U.S. 92, 92-97 (1986) (holding that a city prohibition of nude dancing in a state-regulated tavern was a permissible exercise of state power under the Twenty-First Amendment, which had been delegated to the city).

117. *See, e.g.,* *L'Hote v. New Orleans*, 177 U.S. 587 (1900).

118. *See, e.g.,* *Dwyer v. People*, 261 P. 858 (Colo. 1927); *Fernandez v. Alford*, 13 So. 2d 483 (La. 1943).

119. "[The police power] may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and im-

the Fourteenth Amendment, the arbiter of this quotient of public morals is the majority of a state's legislators.¹²⁰

(1) *Bowers*

In *Bowers v. Hardwick*,¹²¹ the Court upheld the application of the Georgia sodomy law as an exercise of that state's police powers.¹²² Writing for the majority, Justice White noted that the citizen's argument for the right to engage in private conduct between consenting adults could not overcome the state's interest in the prohibition of sodomy. White reasoned, "[I]t would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road."¹²³ In finding that the sodomy law met the rational basis test for upholding a statute burdening an interest that does not amount to a fundamental right, Justice White wrote:

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.¹²⁴

mediately necessary to the public welfare." *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911).

120. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

121. 478 U.S. 186 (1986).

122. The statute before the Court provided, in part:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . .

Id. at 188 n.1 (quoting GA. CODE ANN. § 16-6-2 (Michie 1984)).

123. *Id.* at 195-96.

124. *Id.* at 196. Chief Justice Burger, in an opinion that may one day invite an Establishment Clause challenge to sodomy laws, concurred, noting that "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." *Id.* at 197 (Burger, C.J., concurring). Justice Powell concurred, reserving his Eighth Amendment concerns regarding the 20-year sentence under the Georgia statute. *Id.* at 197-98 (Powell, J., concurring).

Justice White thus applied a stunted form of the essential element of the citizen's argument, that the challenged law does not use rational means to achieve a legitimate end, into a single phrase, that there be "a rational basis."¹²⁵ The difficulty here is obvious: All that Justice White has considered is the end; the legislative interest is composed of both the means and the end.

There are two state interests that can be enunciated in *Bowers*, one a narrow interest in prohibiting sodomy per se,¹²⁶ and the other a broader interest in prohibiting sodomy in order to promote morality. It is the second formulation that Justice White adopted as the only characterization appropriate for defining the state's interest. Having thus defined the state interest, he went no further. He did not expressly consider whether a prohibition of an act of sodomy, using the

Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens wrote a strong dissent arguing that the sodomy statute should be reviewed as an infringement of the fundamental right to privacy and should be upheld only if the state could demonstrate a compelling interest. *Id.* at 199 (Blackmun, J., dissenting). In his view, the state had failed to prove a rational relationship to a legitimate state interest because it did not show a logically sound link between conduct forbidden by the statute and the health risks argued by the state. *Id.* at 210 n.4. Additionally, and more importantly, Justice Blackmun asserted that the Court must scrutinize legislation, regardless of the majority's fervent, deeply held beliefs. *Id.* at 210-13.

125. Granted, the term "rational basis" has been used for some time on the American bench to describe the minimum content of a statute. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (holding that state utility regulations will not violate due process if there is a "rational basis" for them). Even so, the fundamental enquiry of rational basis remains whether the means chosen fit permissible ends, and such a formulation has continued to be used by the Court since it was first applied in its more fundamental task in *McCulloch*. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."), *applied in New York v. Miln*, 36 U.S. (11 Pet.) 102, 137 (1837) ("Whilst a state is acting within the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit."); see also, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989) (holding that the statute at issue "pursues a legitimate end by rational means"); *General Motors Corp. v. Romein*, 112 S. Ct. 1105, 1112 (1992) (holding that the retrospective application of a pension statute met the due process test of "legitimate legislative purpose furthered by rational means").

Thus, to evaluate the due process of a law by comparing its means to its end is far from a rigorous review. It is implicit in every application of the Court's most lenient standards, whether described as a test for "rational basis" or a "rational relationship."

126. Of course, the Court was considering only a consensual act of sodomy with no attribute of force or incapacity in issue. Put this way, it becomes clear that there can never be one act of sodomy, there must be two at any given time. *Bowers*, 478 U.S. at 196.

language of the Georgia statute, is a rational means to promote morality.¹²⁷ That enquiry will be considered in Part V.

(2) *Barnes*

A citizen's First Amendment challenge in *Barnes v. Glen Theatre, Inc.*¹²⁸ was likewise overwhelmed by a police interest in good morals when the Court upheld Indiana's public indecency law, which barred nude dancing performed as public entertainment.¹²⁹ The effect of the state nudity statute was to require dancers to wear pasties and a G-string, a requirement challenged by a peep show, a bar, and a theater in South Bend, Indiana. Writing for a plurality including Justices O'Connor and Kennedy, Chief Justice Rehnquist wrote, "This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation."¹³⁰ After finding that nude dancing is subject to some First Amendment protection, the plurality found that the state statute met the standards for regulating conduct as speech in *United States v. O'Brien*.¹³¹ Specifically, the Court noted that the statute was within the state's power and furthered an

127. Although the most obvious conclusion from this observation might be that the two-stage rational relation test is unnecessary, that conclusion was hardly stated in the opinion. It is at least as likely that it was merely brushed aside by the majority as overly pedantic or embarrassing.

128. 111 S. Ct. 2456 (1991).

129. The statute before the Court provided, in part:

(a) A person who knowingly or intentionally, in a public place: . . . (3) appears in a state of nudity; or (4) fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor.

(b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

Id. at 2462 n.2 (quoting IND. CODE § 35-45-4-1 (1988)).

130. 111 S. Ct. at 2462 (citing, among other cases, *Bowers*).

131. 391 U.S. 367 (1968). *O'Brien's* test of a statute that burdens symbolic speech requires that

a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377 (footnotes omitted).

important state interest,¹³² that the statute is unrelated to free expression,¹³³ and that the statute is not unduly burdensome.¹³⁴

One of the more distinct criticisms made by the dissent was that prior cases upholding state exercise of police powers over immoral conduct had governed such conduct without exceptions, and yet the Indiana statute was solely addressed to public nudity.¹³⁵ Justice White's dissent asserted that, "[a]s a result, . . . simple references to the State's general interest in promoting societal order and morality is not sufficient justification for a statute which concededly reaches a significant amount of protected expressive activity."¹³⁶

132. Despite the lack of an enunciated reason, the plurality was willing to construct the purpose from the face of the statute. *Barnes*, 111 S. Ct. at 2461; see *supra* text accompanying note 130.

133. *Id.* at 2463.

134. In the worst string of puns in the history of the Court, the Chief Justice of the United States of America declared that "it is without cavil that the public indecency statute is 'narrowly tailored;' Indiana's requirement that the dancers wear at least pasties and a G-string is modest, and the bare minimum necessary to achieve the state's purpose." *Id.*

Justice Scalia concurred, joined by Justice Souter, reasoning that nude dancing is conduct unprotected by the First Amendment and the statute's moral basis is sufficient to pass muster under the rational basis test:

Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, "*contra bonos mores*," i.e., immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. While there may be great diversity of view on whether various of these prohibitions should exist (though I have found few ready to abandon, in principle, all of them) there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality."

Id. at 2465 (Scalia, J., concurring). Justice Souter wrote separately, both to consider the expressive content of dance and to suggest a justification for banning prostitution as a means of inhibiting harmful secondary effects. *Id.* at 2468 (Souter, J., concurring).

135. *Id.* at 2474 (White, J., dissenting). Justice White, joined by Justices Marshall, Blackmun, and Stevens, dissented, arguing that nude dancing is fully protected by the First Amendment and that the state had not met its burden of justification.

136. *Id.* at 2473. Continuing, Justice White considered the nature of the majority's hypothesized motives and wrote:

Legislators do not just randomly select certain conduct for proscription; they have reasons for doing so and those reasons illuminate the purpose of the law that is passed. Indeed, a law may have multiple purposes. The purpose of forbidding people from appearing nude in parks, beaches, hot dog stands, and like public places is to protect others from offense. But that could not possibly be the purpose of preventing nude dancing in theaters and barrooms since the viewers are exclusively consenting adults who pay money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates.

Id.

Barnes presents many similarities to *Bowers*, but also a few startling contrasts. Not the least among the distinctions is that Justice White, in his *Barnes* dissent, demanded a type of precision in analyzing Indiana's interest in nude dancers that he avoided in discussing Georgia's interest in sodomites.¹³⁷ In contrast, the *Barnes* plurality was content to broadly define the state interest at issue as its compelling interest in public order. Once the plurality determined that the requirement of small bits of cloth to cover the genitals and nipples was constitutional under the *O'Brien* test, it failed to consider, beyond an underived conclusion, whether the ends of public morality or order were rationally supported by the means of the statute.¹³⁸

(3) *The Lost Chord: Due Process*

We are left to speculate where the internal consideration of state interests in morality, minimal as that might be, has gone. Despite continuing assertions that state statutes must be rationally related to a permissible state purpose, *Barnes* and *Bowers* imply that a rational relationship of means to purpose is unnecessary and that only permissible state purposes will be required.

Such a result is incoherent. As the Court has long accepted police powers as a state interest,¹³⁹ the essential question in its review of a police powers statute must be whether the form of the statute is rationally related to the exercise of that power. In other words, the review turns on what is rational and what is irrational in the relationship of a statute to the promotion of good morality. Recent scholarship has very comprehensively explored the idea of the legal promotion of morality, an idea generally described as legal perfectionism. Perfectionist theory may be able to enunciate several discrimi-

137. Cf. text accompanying notes 122-127.

138. The only logical link made in any way between morality as an end and the statute as its means followed a historical recitation of nudity laws with the conclusion, "[P]ublic indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places." *Barnes*, 111 S. Ct. at 2461.

139. There is no necessary level of importance in a state assertion of the police power, although it is generally described as "significant." The labels the Court has used have varied according to the claims of the parties and the interests of the states. See, e.g., *id.* at 2462 (Rehnquist, J.) (state interest in public indecency "substantial" interest in order and morality); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 505 (1987) (state interest in preventing land subsidence is "significant and legitimate"); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 416 (1983) (state interest in protecting consumers from natural gas price escalation is "significant and legitimate"); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 314 (1981) (police power interest in nonresident employee is "important"); *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1088 (7th Cir. 1990) (state interest in regulating public indecency is "legitimate and significant").

nating requirements for the rational relationship of a statute to good morals.

IV. Legal Perfectionism as a Basis for Rational Laws

We turn, then, to whether there is a meaningful content of a rational relationship between the means of a statute and the end of encouraging a concept of morality. Despite the Court's reluctance to engage in such an enquiry to date, the Court's rhetoric must have some meaning. The argument of this Part presents an articulable basis for a rational relationship review of a morals statute that is both minimal compared to the review of heightened scrutiny and resonant with the methods of interest examination at each level of scrutiny. The result is a more articulate description of the relationship between statutory methods and state interests, a description that can, perhaps, encourage judicial review of this "unfocused interest" which is both more flexible and more predictable.

A. The Idea of Legal Perfectionism

The notion that the government has, or at least should have, the power to proscribe conduct on the basis of the moral attributes of that conduct has frequently been rejected in recent decades. In general, this rejection of laws based on moral claims alone has been swept within the labels of "neutrality" and "libertarianism."¹⁴⁰ These terms include a variety of theories that may support laws of various degrees of moral justification, if these laws are justified in other, independent contexts that are derived from views of liberty, equality, or property.

140. Neutrality, in its manifold nature, is central to a group of influential modern liberal writings. See BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 10 (1980); RONALD DWORKIN, *A MATTER OF PRINCIPLE* 222 (1985); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 272 (1974). The most exhaustive presentation of a neutral conception of law is probably that of Joel Feinberg. See JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* (1988). One of the better overviews of these theories is Will Kymlicka's recent essay, "Libertarianism," in WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 95 (1990).

There is a broad array of meanings for "neutrality," and for every meaning there is a different contour of what the theory it represents would require or forbid of the state. These contours vary most at the level of abstraction in which their labels are made. The most broad may be that "neutrality" requires the state to create a political framework in which potentially conflicting conceptions of the good can be pursued. See Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 *ETHICS* 883 (1989).

The idea of (or at least the term) "legal perfectionism" arose as a rejection of the more radical neutral and libertarian thought.¹⁴¹ "Perfectionism" has gained increasing attention among legal and political theorists since its rather haphazard birth in 1970. The term, coined by John Rawls¹⁴² and developed primarily by Joseph Raz,¹⁴³

141. The initial quarry of perfectionist critique was the radical egalitarianism perceived in John Rawls' early project. See VINIT HAKSAR, *EQUALITY, LIBERTY, AND PERFECTIONISM* 17-62 (1979). The idea of perfectionism is, of course, not new. Its natural law roots are traced in ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (1993).

142. JOHN RAWLS, *A THEORY OF JUSTICE* 325 (1971) [hereinafter RAWLS, *A THEORY OF JUSTICE*]. At the time, Rawls's use of perfectionism—presented in two guises as alternative bases for the constitution of the ideal state from that he developed from his thought experiment—attracted limited discussion. Rawls presents perfectionism in a radical and a moderated form. The radical form requires a Nietzschean organization of society to concentrate resources for the realization of certain forms of human excellence by the most talented. The more moderate, Aristotelian form organizes society so resources are allocated according to a principle of perfection that is one standard among several balanced against other principles by intuition. In both forms, the need to preserve cultural values is great enough to demand resources that might otherwise directly go to make the poor happier. In the second form, this may be done merely by setting aside a minimum amount of social resources to advance the needs of perfectionist goals. *Id.* For the bibliography of consideration of Rawls's perfectionism in its first decade, see Kai Nielsen, *The Choice Between Perfectionism and Rawlsian Contractarianism*, 6 *INTERPRETATION* 1132 (1977); David L. Norton, *Rawls's Theory of Justice: A "Perfectionist" Rejoinder*, 85 *ETHICS* 50 (1974); Martha C. Nussbaum, *Shame, Separateness, and Political Unity: Aristotle's Criticism of Plato*, in *ESSAYS ON ARISTOTLE'S ETHICS* 395, 402 (Amélie Rorty ed., 1980); and HAKSAR, *supra* note 141. (Haksar's treatment of Rawls is closely examined in the (rather negative) reviews of Haksar's book, see, e.g., Derek Browne, Book Review, 59 *AUSTRALASIA J. PHIL.* 256 (1981); David Schafer, Book Review, 34 *REV. METAPHYSICS* 378 (1980); D.A. Lloyd Thomas, Book Review, 22 *PHIL. BOOKS* 219 (1981); Andrew Ward, Book Review, 56 *PHIL.* 131 (1981).) Perfectionism continues to be a Rawlsian stalking horse. See JOHN RAWLS, *POLITICAL LIBERALISM* 292-95 (1993) [hereinafter RAWLS, *POLITICAL LIBERALISM*].

Legal perfectionism in the modern context is a direct descendent of the classical political doctrine that a principal duty of the state is to inculcate and strengthen the virtues of individuals. This duty is related to the ancient problems of human perfection and perfectibility. Historical considerations of perfectionism as a term describing the perfectibility of man through progress are summarized in three twentieth-century works, most notably in JOHN A. PASSMORE, *THE PERFECTIBILITY OF MAN* (1970), but also in VIRGINIA L. MULLER, *THE IDEA OF PERFECTIBILITY* (1985) and MARTIN FOSS, *THE IDEA OF PERFECTION IN THE WESTERN WORLD* (1946). Related concepts are often dealt with as questions of progress. For the classic work on the history of the idea of progress, see J.B. BURY, *THE IDEA OF PROGRESS* (1920).

Questions of the state's promotion of virtue and the methods of human perfectibility became linked during the Enlightenment, after which authors such as Godwin argued not just for the need to perfect the individual by promoting constant moral improvement, but also for limiting the state's role in such a process. Godwin's discussion of the role of the state in perfecting its citizens is in a chapter added to the third edition of *Political Justice*. As one would expect of a near-anarchist, the role Godwin assigned to the law is limited, but the perfection of human spirit remained an essential goal of political society and its

has come to represent a response to liberal visions of the state as neutral among competing comprehensive views of the well-led life. As Dr. Stephen Gardbaum noted in his recent commentary, the perfectionist argument posits two claims: that one way of life is better than others and that, as a result, the state should promote it.¹⁴⁴ In essence, legal perfectionism as a doctrine provides that the state should promote an interest in each citizen pursuing a well-led life.¹⁴⁵ This interest is made manifest in a simple, if contentious, idea: The law should

legal institutions. See 1 WILLIAM GODWIN, *ENQUIRY CONCERNING POLITICAL JUSTICE AND ITS INFLUENCE ON MORALS AND HAPPINESS* 96 (3d ed. 1985) (1798).

It might also be helpful to note the general independence, yet similarity, of projects between writers concerned with perfectionism and those concerned with communitarianism and Republicanism. The essential difference is that perfectionism per se is concerned only with the enshrining of some moral values, while communitarianism and Republicanism are concerned more with particular sources of specific values that deserve legal recognition for reasons that are dependent on these values and their origins.

143. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986). To ascribe the development of the current understanding of perfectionism to only two writers is, of course, oversimplification.

In *The Morality of Freedom*, Professor Raz provided a foundation for the discussion of perfectionism contra the antiperfectionist conceptions of liberal neutrality, which was capitalized upon by his critics, most notably Jeremy Waldron. See Jeremy Waldron, *Autonomy and Perfectionism in Raz's Morality of Freedom*, 62 S. CAL. L. REV. 1097 (1989). Further refinement of the concept has been suggested by Professor Feinberg, whose intricate division between "legal moralism" and "perfectionism" is important in the development of his larger project. 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* 9, 39-80, 277-317 (1988). Most other writers, however, have included elements of what Feinberg considers not just perfectionism but also legal moralism in "perfectionism." See, e.g., GEORGE, *supra* note 141, at 19-47.

144. Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350, 1353 (1991). There are many restatements of this two-step argument; I expand it to four steps below in order to encompass distinctions in the theoretical and doctrinal senses of legal perfectionism. See *infra* text accompanying notes 156-163. Professor Waldron built upon Raz's arguments for a state duty to engage in certain perfectionist lawmaking and characterized the argument as "the view that legislators and officials may consider what is good and valuable in life and what is ignoble and depraved when drafting the laws and setting the framework for social and personal relationships." Waldron, *supra* note 143, at 1102. Waldron, however, rightly points out that all of these post-Rawlsian characterizations are refinements of the Aristotelian doctrine that "the legislator must labour to ensure that his citizens become good men. He must therefore know what institutions will produce this result, and what is the end or aim to which a good life is directed." *Id.* (quoting ARISTOTLE, *POLITICS* 317 (E. Barker trans., 1958)).

145. Of course, I have yet to deal here with two overwhelming controversies: whether there truly is one mode of living one's life that is better than others, and, if there is, how various modes will be ascertained. It is at these moments that the link between modern theories of natural law and perfectionism seems an apparent solution. For now, I merely suggest that the doctrine of perfectionism rests upon the supposition that some projects or modes of life are distinctly and knowably preferable to others.

encourage a citizen to live a good life and discourage a citizen from living a bad life.

The word "perfectionism" might provoke some unfortunate connotations that are inapplicable to the concept of legal perfectionism. Specifically, legal perfectionism is *not* a doctrine based on a utopian vision of the perfectibility of mankind.¹⁴⁶ Rather, it is the simpler notion that the law, through its sanctions and encouragements, makes it more likely that an individual will live the life of a good citizen.¹⁴⁷ Furthermore, legal perfectionism is conceptually distinct from (though sometimes inclusive of) the idea of legal paternalism, or the justification of law for the sake of the citizen, because the purpose of the perfectionist attribute of a law is to encourage a citizen to be a better member of the polity.¹⁴⁸ Lastly, the doctrine of legal perfectionism does not imply the promotion of any single deontological or natural conception of law.¹⁴⁹ These conceptions do, however, perform an im-

146. This sense of perfectionism as pursuing a better, as opposed to a best, life, may be consonant with the concept of virtue held by the Founders, whose legal systems included abundant rules to promote both civic and personal virtue. See ANN F. WITHINGTON, *TOWARD A MORE PERFECT UNION: VIRTUE AND THE FORMATION OF THE AMERICAN REPUBLICS* (1991). Even so, a currently useful relationship that one might posit between legal perfectionism and perfectibilism is that based on the idea of progress popular among the early twentieth century Progressives. In other words, over time whatever conceptions of the good citizen are employed by the state, these conceptions might somehow be improved over time, thus leading the populace of the state to an increasingly better life. See BURY, *supra* note 142.

147. The notion of what constitutes a good citizen is complicated, but for the moment may be considered as merely a citizen who, in general, follows perfectionist laws by habitually acting in accordance with the moral reasons inherent in them.

148. In other words, the perfectionist sovereign, whether the citizenry or a single person, has an interest in each citizen living a well-led life; the duty enforced by the state is a duty of the citizen to the state. The paternal notion that a law might operate to improve a particular citizen's life for the sake of that citizen, the duty enforced paternally, is a duty of each citizen to herself. Enforcement of such a self-regarding duty is only an indirect result in a perfectionist justification of a law. (This distinction, while helpful in considering the perfectionist attribute of any legal norm, is critical to the role legal perfectionism plays in considering "victimless crimes.")

149. As noted, the Aristotelian origins of legal perfectionism are never far from the new theoretical construction, and certain writers have formulated specific conceptions of perfectionism that are tied very carefully to specific functions of the state or contents of law. The most well known is certainly Raz's view that the *summum* of perfectionism, as well as its sole justification, is the promotion of individual autonomy. See RAZ, *supra* note 143. Professor Griffin has developed a perfectionist model that is resonant with the model of underived virtues set forth by Professor John Finnis. See JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE* 62-64 (1986). For a more sophisticated model, see THOMAS HURKA, *PERFECTIONISM* (1993).

The very diversity among the results of each of these projects demonstrates that the commonality of perfectionism per se is its method. There may indeed now be a central case for certain rules of law to be appropriately described as perfectionist, but that is not to

portant role in the scheme of legal perfectionism; they provide fodder for competing sides in the towering controversy inherent in perfectionist lawmaking: the debate over the appropriate content of the "well-led life" of the "good" citizen.¹⁵⁰

These distinctions aside, a further note may illuminate the nature of legal perfectionism as an attribute of a law. As a single attribute of law, perfectionism does not exclude the description of any other attribute of law, except one premised upon the rejection of perfectionism. There are too many distinct interests of the national and state governments for the governmental interest in the good citizen to be exclusive of, or comprehensive of, state interests in the legal environment of the citizen.¹⁵¹ Recognizing a multiplicity of possible governmental interests in a single law, it is only a short step to consider that any one law

say that the central case of the mechanism or theory of perfectionism must be similarly identified.

150. There are important conceptions of natural law that might be immediately suggested to the reader in response to this distinction, namely the sophisticated models of natural law based on moral reasoning and moral realism, particularly as these models have been developed by John Finnis and Michael Moore. See John Finnis, *Natural Law and Legal Reasoning*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 134 (Robert P. George ed., 1992); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); see also, e.g., Michael S. Moore, *Law as a Functional Kind*, in *NATURAL LAW THEORY*, *supra*, at 188; Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061.

Legal perfectionism is distinct from natural law as described by these models in two significant ways. First, the conception of the well-led life employed in a perfectionist law need not be based on any objective or practically reasonable moral value. Instead, the conception must only be that which is chosen by the appropriate lawmaker. Second, objective or practically reasonable conceptions of law play a limited, although still significant, role within a perfectionist framework: While natural law conceptions form the basis of arguments over how or what the lawmaker should choose (and thus the basis for criticizing the lawmaker's choices), they do not serve as a comprehensive model for the lawmaker's choice. These two distinctions suggest that a perfectionist description of law may serve as a procedural matrix in which natural law arguments may provide reasons for specific substantive legal requirements.

151. There is a vast arena of legal philosophy that is implicitly opposed to this simple suggestion that a single law may be supported by multiple justifications. Indeed, much of Rawls's project has been to propose multiple justifications for an organization of the state subject to overlapping consensus, in lieu of more established arguments for an organization of the state pursuant to a single teleological or utilitarian justifying principle. See RAWLS, *A THEORY OF JUSTICE*, *supra* note 142, at 22-26; RAWLS, *POLITICAL LIBERALISM*, *supra* note 142, at 133-69. In considering such a project related to individual laws, I have begun to explore this argument as an analogy to the distinction between algorithms based on the law of excluded middle and those based on "fuzzy logic." See Robert Justin Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL L. REV. 811 (1990); Lofti A. Zadeh, *Fuzzy Sets*, 8 INFO. & CONTROL 338 (1965). Initially, there appears to be a rich field for study here.

might reflect not just one state interest but a host of them.¹⁵² Hence, a law might indicate a state interest in promoting an ideal of the good citizen, even though other interests are also present in the operation of that law.¹⁵³ So legal perfectionism, described in its most generic form, is insufficiently comprehensive to justify, or to explain, or to criticize every law in a modern legal system. It is meant to provide methods to describe the function of only certain laws and acts of lawmakers, to criticize certain laws as exercises of state power, and to use one basis to criticize the content of the legal system as a whole. These methods are limited in scope and subject. Therefore, some laws may be only partially explained, justified, or criticized by this doctrine, and others not at all.

The state interest in the good citizen, as the governmental interest is described by legal perfectionism, similarly varies in its descriptive and critical functions in the constitutional examination of any statute or other legal claim on a citizen's conduct. In certain circumstances, the state interest in the good citizen is an applicable description of a statute's rationale, but that does not make other interests inapplicable. Even so, it is unnecessary that the state interest in the good citizen must be the most salient of the applicable reasons to support a law in order for it to be justified by a perfectionist account.

152. The idea that the converse—a host of laws may support one perfectionist interest—is also true will be explored in Subpart B.2., *infra*.

153. An obvious example of the multiplicity of state interests in a single law is a statute prohibiting murder. Clearly, such a law reflects state interests in simply preventing harm or maintaining public order. There are, however, two means by which legal perfectionism describes state interests in such a law. First, the state may define an interest in the potential victim: No one should live in fear of unjustified death at the hands of another. Second, the state may assert an interest in the potential murderer: Murder is so wrong an act that it cannot be tolerated.

There are clearly non-perfectionist interests in a murder statute, such as strictly preventing harm to citizens. The interrelationship of the harms principle to perfectionism is complicated and beyond the scope of this Article, but at least some formulations make harm prevention exclusive of moral interests in the wrongdoer.

There are less obvious non-perfectionist state interests at work in a murder statute, interests that a lawmaker might consider to be compelling reasons to enact a murder statute, independent of any other interests. One less obvious but potentially compelling government interest is maintaining foreign trade; the commercial representatives of other states and of foreign companies may be unwilling to travel in an area without the protection of a murder statute. Accordingly, to consider fully the state interests in the prohibition and punishment of murder, one must consider a potentially lengthy list of various interests. The fact that some of these interests might be predominant, or at least more important, does not exclude others.

B. The Method of Legal Perfectionism

(1) *The Central Case of Legal Perfectionism*

Perfectionism is a doctrine about the law, which claims that legislators and officials may consider what is good and what is depraved in a human life when drafting laws that deal with how citizens lead their lives. Thus, perfectionism is a doctrine for making laws according to particular types of reasons, with the intended practical effect that people governed by such laws will lead good lives (or at least lives that are better than they would be without the law).

The doctrine of perfectionism is based on four assertions:

- (1) Some forms of life are better than others.
- (2) It is possible to judge some of the conditions that constitute a good life.
- (3) The law can assist in making lives good.
- (4) Neither individual lawmakers nor the institutions of law are morally excluded from attempting to make or enforce laws that fulfill such a role.¹⁵⁴

Perfectionism is also a theory about the law, which claims that the substance of some laws that deal with how citizens lead their lives may be practically based on specific views of what is good and what is depraved in a human life. This theory may serve both as a tool in the criticism of or the advocacy for a specific law, and as a method of explicating or understanding a specific law. The theory of perfectionism is based on four assertions, which are roughly parallel to those of the doctrine:

- (1) Particular form of life *X* is good (or bad).
- (2) We know that this is so for some reason which can be communicated between individuals.
- (3) Form of life *X* can be efficaciously encouraged (or discouraged) through the operation of a particular law.
- (4) The means employed by this law are compatible with other elements of the legal system that are of equal or greater concern to lawmakers as the form of life in question.

154. This fourth doctrinal assertion may be the most controversial. The strongest arguments on its behalf are statements with the ring of moral truths, which are themselves analogous to the doctrine of perfectionism. One such statement reflects the Golden Rule: If we can help others, we should do so because we would hope they would do so in a like case. Cultural and philosophical manifestations of this idea are too famous to be ignored. Thus, if the lawmaker can help others to live better lives, the lawmaker is obligated to do so. Such a view is reinforced by beliefs that the state is common property or that there is popular sovereignty, in which cases, the state is invested with some of the moral responsibility of each individual and the lawmaker is obligated to satisfy those responsibilities.

The relationship between the theory and the doctrine is complex and, sometimes, inexact.¹⁵⁵ For some statements based upon the theory to be true, the doctrine must also be true. There are, however, statements that may be derived from the theory which may be true even if the doctrine is false. Even so, the understanding of the doctrine that is pursued here is based on the assumption that the claims of the perfectionist doctrine must include the methods of the perfectionist theory. Therefore, "perfectionism," as used here generically, represents the doctrine as given greater definition by the theory.¹⁵⁶

Legal perfectionism does not, in itself, entail any particular agenda or lists of laws that must be supported by it.¹⁵⁷ The doctrine claims that a particular form of argument for laws is not unacceptable merely because it takes a perfectionist form. Of course, many arguments made according to a perfectionist form may be unacceptable if their particular claims are false.

In other words, perfectionism does not entail any particular conception of the good life, of good and evil, or of other similar views of human life and action. Neither is perfectionism necessarily based on a comprehensive conception of all of the facets of a good life; perfectionist claims may be limited to just one act or condition of life. Still, perfectionism rests on a presupposition that people have significant conceptions of what makes certain lives better than others, even if individual conceptions often conflict. These conceptions can be broad and comprehensive or not, detailed and complete or not. These conceptions can be formulated along consequentialist or deontologi-

155. It may help the casual reader to recall that a theory is a system for understanding a conception, and a doctrine is a basis for belief regarding a conception.

156. The metaphysical accuracy of the truth claims of the doctrine of perfectionism, and other questions that reach toward its philosophical sufficiency, are beyond the scope of this Article. The most popular arguments defending the doctrine in this regard are generally based on the Kantian assertion that man has a duty to society as a whole and to others to enhance the beneficial human differences from the behavior of other animal species. This is the central argument of Haksar. See HAKSAR, *supra* note 141. For a more sophisticated defense along similar lines, see PAUL WEISS, *TOWARD A PERFECTED STATE* (1986). See also Gardbaum, *supra* note 144, for a collection of arguments in support of the doctrine.

157. There are no primary obligations on citizens which must necessarily be enacted according to the doctrine or theory of perfectionism, which is really a framework for the presentation and argument for agendas of such laws. Perfectionist doctrine does, however, include a claim for a Hartian secondary rule that laws may be considered legitimate if they are supported by the operation of perfectionist theory. The doctrine also provides that a law is not considered illegitimate even if it is supported by nothing but operation of the perfectionist theory.

cal lines (although the more frequently encountered are deontological).¹⁵⁸

Describing how the law can "promote" an element of the good is problematic, but it can be thought of in two steps. The first is to encourage citizens to conform to the conception. Conformity might be demonstrated by consonant actions or failures of action (such as not committing murder), or in holding consonant beliefs (such as believing that murder is wrong), or in living under conditions that are consonant to attributes of the good life (such as the community of citizens inhibiting murder), or some combination of these.

The second step is to encourage citizens to accept the validity of the reasons by which the conception is found to be bad or good. This process is the more critical to the nature of perfectionism, and is one distinguishing characteristic from other doctrines, such as paternalism.¹⁵⁹ This process does not restrict the wide variety such reasons might take, including the potential for largely irrational or underived claims of singular moral wrongness or rightness. Thus, perfectionism enshrines a view of morality that is meant to be understood by the citizen as moral bases for action, not merely legal bases for action.¹⁶⁰

An obvious problem facing any perfectionist law is posed by the plurality of views of the good in modern democracies. Rawls and many others have sought to present their conceptions of the well-organized state in a way designed to minimize controversy between those who possess competing moral views.¹⁶¹ Perfectionism does not

158. Arguments about how or whether people come to believe that some condition of life is good or bad are beyond the scope of this Article. Rather, I am concerned with methods by which lawmakers attempt to promote some conception of a good way of life, as well as implications that may be drawn from the use of such methods. This concern is largely distinct from both the substance and the origin of the conception of the good that is promoted.

159. This distinction is, in fact, less important than another: paternalism usually requires regulation for the good of the person regulated. Recall that perfectionism allows the regulation of one person because the good of everyone else depends upon that person living a better life.

160. A limit upon conformity in the first step is apparent from the end of acceptance of reasons in the second step. The aim to encourage conformity must not unduly interfere with voluntariness. Although the law often operates through coercive means, mere obedience is not the goal of the doctrine. Habitual conformity must not be read in this context so that the perfectionist goal is a resentful or blind obedience to the dictates of law. The doctrine of perfectionism is based upon reasons why some way of life is good or depraved. Conformity that would ignore those reasons might secure some diminished benefit of the good life, which may be a necessary initial goal in a perfectionist law. Still, this limited aim cannot supplant a more robust goal of principled choice for the good.

161. The most obvious of these efforts are those based on liberal neutrality. Rawls's more sophisticated view of overlapping consensus is considered in RAWLS, *POLITICAL LIB-*

mandate such consensus among groups that hold opposing views. The method by which lawmakers accept one view of the good life as accurate (and reject others) is central to understanding the doctrine: Lawmakers pick one. The choice is made according to the rules of the legal system, but is guided by the lawmakers' own assessments of the arguments between proponents of distinct and exclusive views.¹⁶² The rules of the legal system are important, however, as they may limit perfectionist argument from being a legitimate basis of justification both for certain decisions at certain times and certain forms or subject categories of decision at any time.

(2) *Laws, Interests, Norms, and Morals*

The understanding that laws based upon perfectionist principles must be comprehensible is critical to the nature of legal perfectionism. In other words, the law, as it is understood (or at least understandable) by the citizen, enshrines a conception of what is good or bad, so that the citizen can rely, not only upon the law itself, but also upon the moral reasoning behind the law, as a basis for action.¹⁶³

In order for this comprehensibility to be possible, the idea of the law that is understood by the citizen must be broader than merely a single statute or rule of a case. It is the more robust sense of the individuated law, the sum of legal obligations in some single regard which the citizen must obey, even if this obligation is formed from a number of legal sources.¹⁶⁴ Thus, the law as the citizen sees things

ERALISM, *supra* note 142, at 133-72. These theories may also seek to avoid conflict between their results and their premises. Even if this were possible, universal acceptance of a theory is no guarantee that a society organized by such a theory would be just. The last statement contradicts the simple contractarian view that consent can demonstrate justice.

162. It is important to note here the difference between hard and easy choices for the lawmaker. In practice, the vast majority of perfectionist choices are quite easily made. Whether to allow murder or starvation are not questions that long occupy the minds of lawmakers. The harder questions, whether to use certain means, such as execution to prevent murder, or arrest to prevent starvation, are generally less important than the easier questions, although the hard questions gain much more attention precisely because they are more difficult to resolve.

163. The law is not, therefore, the sole source of the authority for its obligation. The moral reasoning is available to the citizen, who may then rely upon the morality of the edict as a reason for action. This form of authority is clearly beyond the scope of positivist views of a necessary content of law. See ROGER A. SHINER, *NORM AND NATURE* 267 (1992).

164. Individuation is one of those ideas in jurisprudence that can be as simple or as complicated as one chooses to make it. Simply, it is the view of a particular legal obligation that is the view of the citizen. The most current exposition of individuation is that of Joseph Raz, who builds a very comprehensive meaning as a structure for the interrelationship of laws and norms from the development of the concept by Bentham, Kelsen, and

either does or does not require the rescue of the drowning child. Whether the answer is derived from a single statute, or a host of statutes, court opinions, and authoritative academic treatises, is pretty much irrelevant to the citizen: She just needs to know whether the law will order her to attempt the rescue.¹⁶⁵

At this level of understanding regarding the requirements created by law, it is much easier to understand an interest asserted by state legal institutions. It is not so much the motive of a legislature at any given moment that is relevant, but the operation of all the statutes on a topic, seen through the lens of judicial construction and application as well as historical legislative pronouncements. To consider just one portion of that whole is to see, at best, an imperfect view of the interests the state asserts.¹⁶⁶

Within the legal obligation of a single law there will be, usually, a single essential command, although it may be predicated upon numerous qualifications. The nature of this command, when the law is perfectionist, reflects a moral assertion. These assertions, of course, may be of varying levels of abstraction, but most are relatively concrete. "Do not kill human beings without good cause" and "Do not spread the plague" are such edicts. The moral assertions are patent, and the conduct that is proscribed is clearly related to the moral reasoning underlying the proscription. At this level, the proscription is both legal and normative.

Hart. JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 70, 92 (2d ed. 1980). Professor Tony Honore presents a powerful objection to Raz's view based largely on the notion that professional discourse is the only method of describing "laws." A.M. Honore, *Real Laws, in LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* 99 (P.M.S. Hacker & J. Raz eds., 1977). Raz responds, obliquely, in the postscript essay of his second edition. RAZ, *supra* note 143, at 217.

165. It may be that enforcement is a problematic element for considering the nature of the individuated law. A statute or rule that was validly passed long ago but that has not been enforced may serve to weaken its place in a comprehensive understanding of a citizen's legal obligations. A similar problem arises when a statute remains on the books of a state despite opinions of the United States Supreme Court, or the state's own courts, invalidating nearly identical statutes. The cases of statutes that are not enforced because of laxity, obsolescence, and apparent unconstitutionality are each different. The effects, however, upon a citizen's understanding of the law and upon the appropriate description of an individuated law of these cases may not be that distinct. A comprehensive description of this concern is beyond the scope of this Article.

166. The problem posed by "interests" is a mighty one. Clearly, when several state interests are operating within a single statute, a complete picture of the law supporting each interest may involve such a complicated elaboration to be nearly useless as an explanatory device.

(3) *Laws, Coherency, and Regulatory Compromise*

As a practical matter, many perfectionist laws are not unmitigated prohibitions or commands but are regulations of conduct by various means, such as taxation, zoning, monopoly, or age limits. Laws enacting such regulation are often the product of compromises among various considerations, including not just difficulties of enforcement (or constitutional barriers to enforcement) but also political pressure brought by those who would prefer not to conform to the underlying justificatory norm. There is, therefore, considerable difficulty in considering both whether a law is in some sense really based on such a justificatory norm, and, if it is, whether the law is drawn from the norm coherently.

In attempting to determine how one knows whether such laws are based on perfectionist interests—whether they are based on the promotion of a particular morality—we may briefly draw from the consideration of interests in Part II. By considering these lessons in sum, there may be a natural compromise between the scrutiny of legislative motive and statutory effects. The simplest is to consider any motive that seems intuitively inescapable under either means of interest examination to be a “salient” justification, and to ignore which source of interest definition brought the justification to light.¹⁶⁷ There may be several justifications for any given law, and it is then the role of the Court to determine whether (given the relationships of the salient justifications) all, some, or just one of the justifications need to be satisfactorily established by the state as within the dictates of due process.¹⁶⁸ If one of the justifications that must be so established is a

167. I believe this to be a technique that is resonant with Professor Gottlieb's. See *supra* note 47 and accompanying text.

168. Determining which or all of a law's salient justifications must be satisfied for due process might be intuitive, but logically, it may be no mean task. Assume the existence of a law that is seemingly justified under four theories, two that are utilitarian and two that are deontological. Logically there are a limited number of approaches we can take to our appraisal of their effect. These approaches may be thought of as simple exclusion, simple cumulation, and simple lexical priority. Exclusion is the generally popular view that once we have proven a justificatory theory by a single comprehensive view, that theory is the sole means of justification and all other means are excluded from use. So, a proof that harms-avoidance, or utility, or natural rights generally work can be a proof that the rest are irrelevant or are to be excluded from consideration as justification for law. Cumulation is merely the idea that all appropriate justifications may be considered justificatory, either pro rata or in some weighted sense that may for some groups allow a predominance of one view, or even an exclusion of some views, and yet for the law as a whole requires an undivided respect for the lot of them. Lexical priority assigns an order to justifications, whether as a constant order or a contingent order that varies when laws of different requirement and history are in issue. The satisfaction of a justification of higher priority

perfectionist interest in developing the good morals of the citizen, then in order to make even minimal sense of such a justification, we must consider the individuated law that a citizen must obey, not merely a single enactment that may be the focus of the citizen's challenge.

Thus, one can apply the minimal means-end test of due process to a regulation based on perfectionist claims to good morals. In such a case, the question is whether a citizen can determine what conduct is immoral from a regulatory compromise made between a broad moral edict condemning some conduct and an allowance of the same conduct in certain circumstances. So long as the moral edict is comprehensible despite the legal allowance of immorality, the law is not irrationally pursuing the end of citizens upholding that morality. So, whether a specific compromise defeats the obligation of coherence rooted in citizen comprehensibility becomes a case-contingent matter. In general, however, one might posit a basis for compromises that will likely make a perfectionist law incoherent. A perfectionist regulation may be incoherent if, through the nature of its compromises, it redefines the moral claim so that a citizen cannot readily discern the morally condemned (or for that matter promoted) conduct.¹⁶⁹

means that we do not consider whether a law is justified by reasons of lesser priority. (Why these different approaches matter becomes clear when one imagines the role a justification can play in either the individual decision to disobey or the judicial determination of rational relationship to a legitimate state purpose.)

By combining them, we may have an additional list of compound approaches, such as either cumulation to exclusion or cumulative priority. Given that the three approaches are probably two, because only philosophers and judges often employ exclusion, the two may be inextricable as some function of priority and cumulation. Imagine testing the theory with deontological views that are both based on the best interest of the person for her own sake and based on the best interest of the person for the sake of the community as a whole.

In considering whether the Court might decide a perfectionist interest is salient in a law, this multiplicity of available justifications is no more troubling than it must be for the assignment of any other label. Although it is true both that the Court selects among various justifications, including those suggested by a state and those that are not, and that the Court can thereby declare interests according to preferred results, the fact remains that the Court has, often enough, declared itself to be reviewing a morals law. While such a description might be abandoned in favor of other descriptions, which may be problematic for other reasons, this has yet to occur.

169. For instance, there is a great distinction between defining an act as criminal according to where it is done and according to who does it. In certain circumstances either attribute of a definition may be rational. Thus we accept as rational a "theft" being based in part on the thief being a person without a right to possess what is stolen, or a "public drunkenness" being based in part on the drunkard being in a public space. Even so, it would be irrational to define a theft according to whether property is taken by a short person or a public drunk as anyone in a public park. Therefore, the coherence of moral claims reflected in prohibitions conditioned upon whether the act is committed by certain

(4) *Limits on the Justifications of Legal Perfectionism*

The construction of the theory of legal perfectionism proposed above reflects certain constitutional and legislative limitations that affect most lawmaking, and are particularly applicable in the United States. These limitations take forms that are both related to other constitutional principles and inherent in the operation of a perfectionist law.

The last step in the theoretical description of perfectionism outlined earlier requires that "the means employed by this law are compatible with other elements of the legal system of equal or greater concern to lawmakers as the form of life in question." In other words, a constitutional prohibition is a bar to a particular perfectionist law, whether the prohibition is based upon the limit of authority of the legislature, as with separation of powers or federalism, or upon the grant of such authority to the individual, as with the First Amendment.

There are inherent limitations on perfectionist lawmakers that arise from the first three theoretical elements, particularly the problems of communication and efficacy. The second step requires that we know some form of life is preferable or reputable for some reason that can be communicated between individuals. While this communication can take the form of an underived statement, such as "killing is wrong," the communication may also relate a derived moral reason, such as "noncustodial parents must pay child support *because* the parent is responsible for the child." On the other hand, there are some laws that simply cannot be so explained, particularly when the obligations with the single law are conflicting or ambiguous. In this way, the limitation of step two is related to the theoretical limitation of step three, that the form of life to be discouraged or promoted can be so affected efficaciously through the operation of law.

people or in certain places must turn on the specific relationship among one moral claim to the nature of the prohibition and the nature of the regulatory compromises limiting that prohibition. Thus when prostitution is forbidden throughout a city, except in 20 or so blocks, as in *L'Hote v. New Orleans*, 177 U.S. 587 (1900), the moral condemnation is comprehensible, because the perfectionist claims—that selling sex is immoral and that buying sex is immoral—remain comprehensible even though this immorality is not completely forbidden. Such a condemnation, conditioned upon who violates the underlying edicts (rather than where they are violated), may or may not be comprehensible. So a prostitution law forbidding only children to engage in that trade may be coherent, but a law forbidding married women from engaging in that trade may not be.

C. The Perfectionist Claim of the Citizen upon the Lawmaker: The Role of Judges

Perfectionism implies a very important moral relationship between the lawmaker and the citizen. The act of choosing one claim for the good life at the expense of another—even if it is so elemental as a choice against the private killing of an enemy—is a very special form of moral choice when it is made with the intent and power to bind others to that choice. The lawmaker has a duty in making that choice to act not merely on her own behalf, but also in the interest of all who are expected to conform to it. This duty has broad implications in the operation of the perfectionist theory. Two attributes of it will be briefly touched on here.

The first is that the lawmaker, to whom the legal system's rules give discretion to select the content of perfectionist laws, has a duty to do so using best efforts and good faith.¹⁷⁰ The most significant obligation within these duties of best efforts and good faith is a willingness to reappraise a perfectionist law. Clearly many laws enacted in one age that enshrine some deeply held morality, even of a homogenous polity, may become apparently unjust if the norms of morality upon which the laws were enacted have been generally repudiated.¹⁷¹

The second is that every lawmaker who is personally responsible for the selection or administration of a given rule to bind an individual bears some form of moral duty toward the individual. A judge is not absolved of the claim a citizen has against the judge as perfectionist lawmaker merely because the judge's discretion is limited from casually rejecting the content of a law binding the citizen. At the least, the judge is obligated to ascertain that the discretion-wielding lawmakers minimally fulfilled their obligations of best efforts and good faith. Thus, the judge must account in many instances for a failure of reappraisal by the legislatures or other discretion-wielding entities. This is not to say merely that a judge might strike down a long-unused statute, but also that a judge may be required in outrageous cases to interpret moral changes in society that the legislature has ignored.

170. A full rendering of what "best efforts" or "good faith" mean in this regard may look rather like Professor Fuller's inner morality of law. See LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

171. In this sense, the quest for a conception of the perfectionist law is similar to the common pursuit of the conception of good itself. The understanding of what is good must be constantly reappraised to rid the understanding of error. As a conception of the state, see Isaiah Berlin, *Pursuit of the Ideal*, in *THE CROOKED TIMBER OF HUMANITY* 1-19 (Henry Hardy ed., 1991). As a conception of the good, see IRIS MURDOCH, *THE SOVEREIGNTY OF GOOD* 42-43 (1970).

It might be briefly stressed that this moral claim of a judge participating in the enforcement of perfectionist laws is not suggested to be the full content of judicial review over perfectionist laws. Likewise, the minimal end-means test of substantive due process is not meant to be in any way exhaustive of scrutiny. Both usages of perfectionist theory are meant to serve only as threshold examinations, subject to the panoply of enquiries available at higher levels of scrutiny.¹⁷²

V. Some Conclusions

In this short space, I have tried to relate three broad concepts. First, the Court's adjudication of arguments between governments and individuals turns not so much upon the methods of comparing those arguments as upon the means by which the arguments are reduced to interests. Second, the Court's use of interests is incomplete given the tasks the Justices perform. Particularly, broad interests, such as the "state use of police powers to effect good morals," do not differentiate between the end and the means chosen to attain this end. Third, there are rational bases for comparing morals to laws that might enshrine those morals, regardless of the content of the morals involved.

In considering the relationship of morals to laws, it has been useful to employ methods from legal theory that might explore what it means to rationally relate an end to a means in such a context. From these theoretical foundations, I have suggested certain judicial applications that are resonant to the general methods of interest examination and potentially ameliorative of defects in the current methods of such examinations. I would stress that the test ultimately derived from these foundations is meant to be no more than an articulation of the test employed at the least level of scrutiny in the substantive due process review of a statute. While this minimal ends-means test may echo forms of interest examination employed in higher levels of scrutiny, this echo is inevitable, as they are all methods of examining an interest.

The Court has yet to show either interest or expertise in engaging in a review of the rational relationship between a statutory means and

172. Finally, it should be clear that my focus upon the due process scrutiny for one particular branch of an unfocused state interest, assertions of state police powers to effect good morals, does not suggest that similar concerns may not plague judicial scrutiny of all other state interests. The broader implication of my approach is simply that methods of evaluating the fit between a means and an end, even if the end is unfocused, may be more accessible than a review of the Court's opinions to date would suggest.

the moral end of police powers. This does not mean that it cannot. Such a scrutiny applied in *Barnes* and *Bowers* could, obviously, follow several paths. It seems plausible, though, to suggest that the dictates of perfectionist theory can easily inform certain elements of a rational means review under substantive due process.

In order to engage in such scrutiny, the Court would make two enquiries, very similar in context to the enquiries it now applies. First, the Court would define the interests. Rather than blithely waving the flag of morals, however, the proper interest to define is one that would represent the moral edict that the citizen would follow and be relevant to the Court's decision. In *Bowers*, such an interest was defined by Justice White as the state's interest in preserving good morals by preventing homosexual sodomy.¹⁷³ This level of abstraction in the formulation of a definition is incomplete because it fails to account for the interests proscribed in the completely individuated law supported by the statute that is relevant to Hardwick's claim. Such an individuation would have to account for both Hardwick's interest in committing acts proscribed in the statute and in being free from the investigation necessary to prosecute him for those acts, an investigation that is probably contingent strictly upon his homosexual status.¹⁷⁴ Nevertheless, the first question in evaluating an interest, once it is defined, is whether this interest is too outrageously unrelated to contemporary conceptions of morals to be a rational application of the term "moral." Despite the considerable shift in norms over the last hundred years, homosexuality arguably has not reached a point of sufficient acceptance in society to require the courts to consider impermissible a state interest in regulating homosexuality. Assuming

173. In considering the application of a perfectionist statute, it is unnecessary to choose between either statutory conduct or legislative motive (in other words, motive alone need not be the basis for perfectionism). What is necessary is that, for the law to serve as a reason for action to comport oneself within any moral edict of the law, the law must consistently enshrine the moral conduct that lawmakers select.

174. The Court left unresolved whether the statute really is limited to homosexual conduct, the only consideration made by the Court. The dissent noted that the statute might indeed include heterosexual conduct. *Bowers v. Hardwick*, 478 U.S. 186, 200 n.1 (1986) (Blackmun, J., dissenting). It seemed likely that Georgia's sodomy statute is written but not enforced in a way that includes lesbian acts. At common law, sodomy included heterosexual acts. See *Rex v. Wiseman*, 92 Eng. Rep. 774 (K.B. 1717).

Of course, Georgians have not been idle in the years since *Bowers*, and there is now no doubt that the statute applies to heterosexual conduct. See *Smashum v. State*, 403 S.E.2d 797 (Ga. 1991) (upholding conviction of Anthony Smashum for committing consensual sodomy with a female victim). This fact does not alter the problems described in the text above concerning the limited review of the statute applied to homosexuals, nor does it in any way alter the problem of applications of the statute that turn on marriage.

that a judge reached this conclusion rather than determining that the norms have shifted too greatly, the next question is one of rational means.

Here, the Georgia statute runs into a perfectionist dilemma, because the means of the law must be rationally related to its stated end in such a way that the statute under consideration is part of a coherent individuated law supporting a coherent moral command. In *Bowers*, the divorce between the statutory prohibition of the consensual act of sodomy and the judicially constructed limitation between the application of the statute to homosexual conduct is irrational.

If the moral conduct that is condemned in the state law at issue in *Bowers* is a homosexual act, as the Court implies, then all physical homosexual acts must be condemned, whether committed by males or females, and whether or not they involve the genitals. The undifferentiated choice of some acts in a category of acts of essentially similar moral dimension in the public understanding does not encourage morality in a rational way. If the condemned moral conduct is the placing of the phallus in a forbidden orifice, then every act of such placement must be condemned, even if it includes heterosexual acts, and even if it includes acts by married partners. If the moral motivation that is being promoted is being heterosexual (or the moral conduct that is being condemned is being homosexual) then the law should be written in such a way to communicate this reasoning so that it can be understood by the citizenry. As far as Justice White was concerned, it mattered not that the Georgia statute apparently did not apply in marriage or to heterosexual acts (if we are to follow Justice White's reading of the statute), or that it did not forbid homosexuality. That the statute only forbade genital placement left the sky as the limit for other erotic physical contact between same-sex partners under Georgia law. This is an irrational communication of morality.

Thus, if Georgia seeks to support its sodomy law as a moral condemnation, it should be required to prove that the rationality of the means supports this goal. It must either condemn homosexual behavior or all listed forms of genital usage (including that in marriage), or both.¹⁷⁵ If it condemns any or all of these forms of behavior or motivation as immoral, then its condemnation must be consistent throughout its laws in at least a minimal way. The Georgia law is not part of a

175. Since the regulation of sex between married partners is essentially beyond the power of the state because of the external limitation of the fundamental right to privacy, the state cannot overcome this limit. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

coherent individuated scheme.¹⁷⁶ Thus, as a matter of due process of law, the statute cannot pursue its end by a rational means.

Barnes is a bit trickier, because the enquiry is primarily external to the moral claim of the law reflected in the statute. The argument on the bench, whether the interest in speech is greater or less than the interest in public modesty, is external to the moral edict itself. The internal review does, however, inform the nature of a rational means review of a statute.

The initial question is, of course, the definition of the state interest in morality. Despite Justice White's concern that the Indiana statute's reliance on public conduct created a special application or case as opposed to a general prohibition,¹⁷⁷ the statute may fairly be read as a single coherent rule of universal application to all citizens. This is the case because the distinction between private and public conduct is well established in the culture. This distinction is commonplace when the conduct relates to the human body and its biological functions. The Indiana law singles out conduct that can be regulated as part of a single coherent moral edict: Do not display your own genitals in a public place. The second question, of whether the statute uses a rational means to implement the moral edict, is rather straightforward. So long as review of other statutes or legal materials does not discern a critical dissonance with this edict, a statutory restatement of it reflects rational means.¹⁷⁸

Justice White's concerns that a state statute should be uniform in its application reflect a perfectionist argument for coherence in the underlying norm. But he has gotten his application backwards. In *Barnes*, the norm was a narrowly applied case-neutral norm, relating solely to acts in public. In *Bowers*, the norm could not be so narrowly applied without changing its meaning and becoming overly case-specific. Because police enforcement of the sodomy laws against married couples was unconstitutional, and other forms of legal protections of marriage (such as the carnal knowledge law) are effectively obsolete,

176. To end a discussion of *Bowers* without considering the privacy problem is somewhat disappointing, but the judicial determination of the external limits is considered below in the conclusion drawn from *Barnes*.

177. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2472 (1991) (White, J., dissenting).

178. A caveat to this result is that the external evaluation of laws supporting this interest in preventing the display of genitals in public may create such dissonance. Thus, if First Amendment concerns had protected, or later protect, a public display of genitals in some other context, such as for performance artists, this form of incoherence may arise. This is essentially the effect that prompted the distorted readings of the statute in *Bowers*.

the sodomy law cannot, given its application, relate to a coherent scheme supporting a moral edict.

Barnes and *Bowers* illustrate two deceptively simple problems in minimal scrutiny due process review. Because the Court has so often said that it reviews statutes such as these (once minimal review is selected) to assess their rational basis, the first enquiry remains what that basis might be, or what the state interest will be defined to be. After examining the array of tools the Court has employed to define interests, it seems clear to me that great license is available to the bench to assign some state arguments with particular definitions. Even so, the Court has often enough declared that the state interest before it is an interest in encouraging good morals. Once the Court has made a declaration of the interest before it, it then proclaims to pass on the relationship of the statutory means to this end, but the reasoning necessary to support such a proclamation is not provided. There are, however, simple methods of assessing the rational fit of a statute to its end, even if that end is as unfocused as promoting good morals. The test I have proposed is derived from considering the perfectionist attribute of such laws, and is simply a suggestion to evaluate morals laws according to whether a citizen could understand the morality the law is supposed to enshrine. A statute that is so confusingly written or applied that a citizen cannot learn the moral message the state intends to promote does not promote that morality. This is not to say that the statute must not comport with all other constitutional limits, any more than it is to say that statutes that the Court finds to be insignificantly perfectionist should meet this test. Even so, once the Court finds itself with a statute based on police powers interest in good morals, this test must be a portion of any basic examination of the means chosen to promote that end. To evaluate the due process of a law by comparing its means to its end is far from a rigorous review. It is implicit in every application of the Court's most lenient standards, whether described as a test for "rational basis" or a "rational relationship."

The mode of opinion in which the Court makes such an appraisal of means and ends is not necessarily balancing or categorical. The perfectionist relationship between a claim of morality and the mandates of a law may occur in the generalized valuation of a balancing opinion, merely by using the criteria of the theory of perfectionism to assess the "weight" of the state interest. Simultaneously, perfectionist criteria for moral validity of a law may be thought of as a categorical test which a statute must pass in order to be upheld. Both modes of

adjudication may be appropriate as means of evaluating a citizen's claim of a violated right to substantive due process. Moreover, by evaluating moral claims of the state by such means, the goal of predictability may be enhanced as the unfocused government interest becomes clearer. This would give more information to the legal community regarding the bases for change in the contours of police power laws. Predictability is not, however, enhanced here at the cost of flexible responses to changing ideals of justice. By enhancing the understanding of the moral obligation of the lawmaker to the citizen, the authority of the judge to occasionally act independently of the legislators is more apparent. Within certain strong limitations, this should strengthen the claim of legitimacy of a judicial recognition of a change in norms that has not been acknowledged by other lawmakers.

These tools of reason and consideration in the adjudication of a citizen's suit against a state cannot blind one to the judge's continuing obligation as a lawmaker, or at least as a legal official, to require a citizen to follow the choices of morality made by other people. It is at this stage that we might recall the balance metaphor. We may not be as concerned with the mechanism by which our goods are weighed if we are confident in the honesty of the merchant.